Utah Attorney General's Office
Memorandum

To: Utah Air Quality Board

From: Fred Nelson, Assistant Attorney General

Re: In the Matter of Sevier Power Company Power Plant, DAQE-AN2529001-04

Date: March 22, 2006

These matters are on the Board agenda as action items for the April 6, 2006, meeting:

1. Sierra Club's renewed request to stay proceedings.
2. Executive Secretary's Motion for Judgment on the Pleadings.
   Sevier Citizens raised 14 issues in its Request for Agency Action dated March 16, 2005 (see Attachment E). The Executive Secretary has moved for Judgment on the Pleadings on issues 1-3, 6-7, and 10-13, which if granted, would leave issues 4-5, 8-9, and 14 for the Richfield hearing on May 10, 2006.
3. Executive Secretary's Motion to Dismiss the Sevier Citizens initial Request for Agency Action, dated November 1, 2004 (see Attachment D).
4. Pre-hearing conference.

The attached documents are provided for Board review in consideration of these action items:

A. Letter from Sierra Club and Grand Canyon Trust to the Board dated March 13, 2006.

B. Executive Secretary's Reply to Sierra Club's Withdrawal from Amicus Status dated March 20, 2006.

C. PacifiCorp's Reply to the Sierra Club and Grand Canyon Trust's Declination to Participate any further as Amicus dated March 20, 2006.

D. Sevier County Citizens For Clean Air and Water's ("Sevier Citizens") initial Request for Agency Action dated November 1, 2004.

E. Sevier Citizens' Request for Agency Action dated March 16, 2005 (without attachments which supported its Petition to Intervene, already granted by the Board).

F. Sevier Power Company's Answer to Sevier Citizens Request for Agency Action dated June 10, 2005.

G. Executive Secretary's Response to Sevier Citizens' Request for Agency Action, dated June 10, 2005.

H. Executive Secretary's Motion for Judgment on the Pleadings, dated February 27, 2006, and Memorandum in Support.

I. Sevier Citizens' Response to Executive Secretary's Motion for Judgment on the Pleadings, dated March 13, 2006.

J. Executive Secretary's Reply to Sevier County Citizens' Response to Motion for Judgment on the Pleadings dated March 20, 2006.

K. PacifiCorp's Reply to the Sevier County Citizens for Clean Air and Water's Opposition to the Executive Secretary's Motion for Judgment on the Pleadings dated March 20, 2006.

L. Executive Secretary's Motion to Dismiss Sevier Citizens' first Request for Agency Action, dated February 27, 2006, and Memorandum in Support.

M. Sevier Citizens' Response to Executive Secretary's Motion to Dismiss dated March 13, 2006, and Memorandum in Support.

N. Executive Secretary's Reply to Sevier County Citizens' Response to Motion to Dismiss for Failure to State a Claim on Which Relief can be Granted, dated March 20, 2006.

O. Sevier Power Company's Memorandum in Support of Executive Secretary's Motions for Dismissal, dated March 15, 2006.

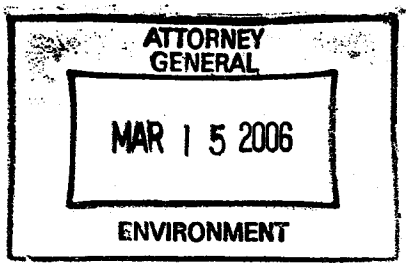
P. Witness Lists for:

Sevier Citizens dated February 15, 2006
Sevier Power Company dated February 23, 2006
Executive Secretary dated February 15, 2006

A

WESTERN RESOURCE ADVOCATES

Advancing Solutions for the Western Environment



March 13, 2006

Utah Air Quality Board
150 North 1950 West
Salt Lake City, Utah 84114

Re: Declining to Participate as Amicus in the Matter of Sevier Power Company Power Plant (DAQE-AN2529001-04).

Dear Utah Air Quality Board Members:

Sierra Club and Grand Canyon Trust (collectively Sierra Club) appreciate your efforts to keep us apprised of the proceedings in the Sevier Power Company Power Plant matter currently before the Utah Air Quality Board (Board). At this time, Sierra Club wishes to make clear that it respectfully declines to participate in this matter as an amicus. We also emphasize that, as anything less than a full party, Sierra Club cannot adequately represent its interests in any proceeding before this Board adjudicating the legality of the air quality permit issued to Sevier Power Company. Finally, we underscore that Sierra Club is in no way in privity with Sevier County Citizens for Clean Air and Water (Sevier Citizens) with regard to any of the issues or claims raised by that organization and currently pending before the Board.

As you are aware, Sierra Club asked for and was denied by this Board full party status to adjudicate the claims raised in its Request for Agency Action relative to the Sevier Power Company Power Plant. Sierra Club has appealed that denial and that appeal, fully briefed and argued, is now pending before the Utah Supreme Court. Immediately after the Board denied it standing to adjudicate its Request for Agency Action, Sierra Club filed a motion with the Board asking it to stay the Sevier Citizens adjudication because, *inter alia*, Sierra Club would be harmed should an adjudication go forward without Sierra Club's full participation. The Board denied Sierra Club's motion.

In lieu of allowing it adjudicate its own Request for Agency Action, the Board determined that Sierra Club could participate as an amicus in the Sevier Citizens adjudication of that organization's Request for Agency Action. According to the record, as an amicus, Sierra Club would **not** be allowed "to conduct discovery, examine witnesses or present other evidence . . . [or] to create or expand the scope of issues (claims or defenses) to be considered by the Board."

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Letter from Richard K. Rathbun, (former) Counsel to Executive Secretary, to All Parties/Counsel of Record, *Re: Proposed Schedule for Discovery and Other Pre-hearing Matters* (June 23, 2005); see also Minutes of Utah Air Quality Board (July 6, 2005). Therefore, as an amicus, Sierra Club would be prohibited from, for example, introducing documents and data, taking depositions or presenting its own expert witnesses relative to any claim or pleading, such as the recently filed Executive Secretary's Memorandum in Support of Motion for Judgment on the Pleadings. In addition, Sierra Club would be prevented from appealing any decision of the Board, including a decision on purely legal issues. Thus, Sierra Club would be prevented from adequately representing its own interests.

Moreover, Sierra Club has consistently argued that its interests are **not** the same as the interests of Sevier Citizens and that the Sierra Club's interests relative to the Sevier Power Company Power Plant are unique and distinct. In addition, were Sierra Club to litigate issues presented in its Request for Agency Action, including issues that are similar to those now before the Board, Sierra Club **would** introduce evidence that is not currently before the Board, **would** present its own expert witnesses, **would** conduct discovery, including requests for admission and depositions of agency staff, and **would** make arguments based on that evidence and discovery that Sevier Citizens has not made and will not make. As an amicus, Sierra Club would not be able to take these steps and therefore would be unable to fully and fairly litigate its interests. As a result, Sierra Club is not and never has been in privity with Sevier Citizens.

Finally, Sierra Club repeats that its appeal before the Supreme Court is fully briefed and argued and therefore may be decided soon. As a result, the organization asks the Board to reconsider its decision not to postpone its adjudication of the Sevier Citizens Request for Agency. Rather, Sierra Club asks that the Board stay this adjudication until the Utah Supreme Court determines whether Sierra Club has standing to pursue its Request for Agency Action.

Thank you for your consideration of this matter. We ask that you continue to serve on counsel for the Sierra Club all pleadings and other documents related to the Sevier Power Company Power Plant matter.

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Attorneys for the Executive Secretary of the Utah Air Quality Board

BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Sevier Power Company Power Plant Sevier County, Utah DAQE-AN2529001-04	EXECUTIVE SECRETARY'S REPLY TO SIERRA CLUB'S WITHDRAWAL FROM AMICUS STATUS

COMES NOW the Executive Secretary, through undersigned counsel, and submits the following Reply to Sierra Club's Letter declining to participate as Amicus in the above-encaptioned matter.

I. INTRODUCTION

On October 12, 2004, the Executive Secretary issued an Approval Order to Sevier Power Company (SPC) to construct and operate a coal-fired power plant in Sevier County, Utah. On November 12, 2004, Sierra Club and Grand Canyon Trust (collectively Sierra Club) filed a Request for Agency Action ("RAA") and a Petition to Intervene to appeal the Approval Order (AO). At an April 13, 2005 Air Quality Board meeting, SPC opposed the Sierra Club's standing to challenge the (AO). On May 12, 2005, the Board issued an order denying Sierra Club's Petition to Intervene, but granted Amicus status to Sierra Club.

Sierra Club appealed the Board's denial of the petition to the Utah Court of Appeals. Sierra Club also requested that the Board stay its denial of intervention, which was opposed by both SPC and the Executive Secretary. The Board denied the request for a stay in a June 6, 2005 order. Sierra Club subsequently requested a stay of the Board's order denying intervention before the Utah Court of Appeals, which was also denied in an order dated August 29, 2005.

The briefing of the issue of the Board's denial of intervention took placed as scheduled. On December 5, 2005, the Utah Court of Appeals transferred the issue of the denial of intervention to the Utah Supreme Court. Oral argument was held before the Utah Supreme Court on February 28, 2006. All parties now await a decision of the Court.

As the Board is aware, Sevier County Citizens for Clean Air and Water (SCC) was granted standing to pursue its own RFA, and the Board has scheduled a hearing on the merits of that RFA in May 2006. On March 13, 2006, Sierra Club sent a letter to the Board in which it declared that it did not wish to participate as Amicus in this matter, but renewed its request that the Board stay the hearing on SCC's RFA. For reasons outlined below, the Board should deny Sierra Club's request.

ARGUMENT

The Executive Secretary acknowledges Sierra Club's decision to withdraw from participation as amicus in this matter, and notes that the circumstances surrounding Sierra Club's participation in this case are no different now than they were when Sierra Club first requested a stay in 2005—no court has overturned the Board's decision denying standing to Sierra Club. Sierra Club's stated reason for its decision is that the organization does not believe that participation as amicus would permit Sierra Club to protect its interests. Sierra Club has also asserted that it is not in privity with SCC as to any of the issues or claims raised by SCC.

Given Sierra Club's position that its interests are not the same as SCC's, the Executive Secretary does not believe that a stay is appropriate. Since Sierra Club has declined to exercise its status as amicus, Sierra Club's eventual participation will depend on the decision of the Utah Supreme Court, a decision that is unlikely to be made before the May 2006 hearing on SCC's RFA. Moreover, Sierra Club itself asserts that its interests are not the same as SCC's. Therefore, a hearing on the merits of SCC's claims will not prejudice Sierra Club. Should the Utah Supreme Court decide that the Board wrongfully denied standing to Sierra Club, Sierra Club will have the opportunity to request relief before the Board, based on its own Request for Agency Action.

CONCLUSION

Sierra Club has declined to exercise its opportunity to participate in this case as amicus. Sierra Club has also renewed its request that the Board stay the Sevier County Citizens hearing pending a decision on Sierra Club's standing from the Utah Supreme Court. Sierra Club has asserted that its interests are not the same as SCC's. Accordingly, the Executive Secretary respectfully requests that the Air Quality Board deny Sierra Club's request for a stay, as Sierra Club's interests will not be harmed by a hearing on what Sierra Club maintains are different issues.

Dated this 20th day of March, 2006.

MARK L. SHURTLEFF
Utah Attorney General

Paul M. McConkie, Assistant Attorney General
Christian C. Stephens, Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2006, I caused a copy of the foregoing to be mailed by United States Mail, postage prepaid, to the following:

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BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier Power Company, 270 MW Coal-Fired Power Plant, Sevier County Project Code: N2529-001 DAQE-AN2529001-04	**PACIFICORP'S REPLY TO THE SIERRA CLUB AND GRAND CANYON TRUST'S DECLINATION TO PARTICIPATE ANY FURTHER AS AMICUS**

In the Utah Air Quality Board's ("Board") Order of May 12, 2005, PacifiCorp was granted amicus status in this proceeding to "to present briefs and oral argument on issues as will be further defined by the Board." Pursuant to that Order, PacifiCorp hereby submits this reply brief ("Reply") to the Sierra Club and Grand Canyon Trust's (together "Sierra Club") March 13, 2006 letter to the Board declining to participate any further in this matter as an amicus ("Declination Letter").

I. OVERVIEW

On October 12, 2004, the Utah Division of Air Quality "UDAQ") issued an Approval Order ("AO") granting a Prevention of Significant Deterioration ("PSD") permit to the Sevier Power Company ("Sevier Power") to construct and operate a power plant in Sigurd, Sevier County, Utah. On November 1, 2004, Sevier County Citizens for Clean Air and Water ("SCC") filed its Request for Agency Action ("First RFA") with the Board contesting the AO. On March 16, 2005, SCC filed another document attempting to further substantiate its contest of the AO ("Second RFA"). In its Second RFA, SCC asserts fourteen separate claims.

On May 12, 2005, the Board issued an Order granting PacifiCorp, as well as Sierra Club, "amicus status in the proceeding to present briefs and oral argument on issues as will be further defined by the Board." *See* Order Granting Amicus Status attached hereto as Exhibit A. On February 27, 2006, the Executive Secretary submitted a Motion for Judgment on the Pleadings, wherein it moved to dismiss most of SCC's claims, including Claim #3 -- whether the applicable statute and regulations mandate that the use of the integrated gasification combined cycle process ("IGCC") be included as an available technology in determining the best available control technology ("BACT")(the "IGCC/BACT Legal Issue").[1]

Sierra Club did not file any dispositive motion of its own. Similarly, Sierra Club did not file any response or opposition to the Executive Secretary's Motion for Judgment on the Pleadings. Instead, on March 13, 2006, Sierra Club simply filed the two-page Declination Letter to the Board indicating that it "declines to participate in this matter as an amicus." *See* Declination Letter attached hereto as Exhibit B.

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[1] PacifiCorp separately has submitted a brief in support of the Executive Secretary's Motion for Judgment on the Pleadings in regards to SCC's Claim #3 and in opposition to the SCC's Response.

II. ARGUMENT

A. Sierra Club Missed its Deadline for Filing any Dispositive Motion or any Opposition Memorandum to the Executive Secretary's Motion for Judgment on the Pleadings

Sierra Club failed to file any dispositive motion in this matter (for example, it did not file a motion for judgment on the pleadings, motion to dismiss for failure to state a claim, motion for summary judgment or any other such motion). More importantly, Sierra Club failed to file any response or opposition brief to the Executive Secretary's Motion for Judgment on the Pleadings by the March 13, 2006 deadline set forth in the Board's January 4, 2006 Amended Schedule. *See* Amended Schedule attached hereto as Exhibit C. Accordingly, having failed to timely brief the IGCC/BACT Legal Issue within the timetable established by the Board, Sierra Club waived its opportunity to brief and address this important legal issue that will be decided by the Board. Instead, well after the deadline for submitting response or opposition briefs had lapsed, Sierra Club submitted its Declination Letter. Because Sierra Club missed the filing deadline, its Declination Letter should not be recognized by the Board and should be given no weight.

B. Sierra Club was Given Every Opportunity to Participate in the Resolution of the IGCC/BACT Legal Issue, but has Opted to Decline any Further Participation

The Board, the Executive Secretary and the parties to this proceeding invited and included Sierra Club in all aspects of developing the parameters of the amicus role, the original Scheduling Order, and the Amended Scheduling Order. Nevertheless, Sierra Club has now opted not to participate any further.

In its Order granting amicus status, the Board expressly noted that it "recognizes the value of receiving input from the Sierra Club and PacifiCorp on issues raised in this adjudicatory proceeding. Therefore, the Board grants Sierra Club and PacifiCorp amicus status in the proceeding to present briefs and oral argument on issues as will be further defined by the Board."

Moreover, on June 23, 2005, the Executive Secretary sent a letter to Sierra Club, as well as to PacifiCorp, expressly invited their respective "input on the proper roles, i.e., allowed activities, by Sierra Club and PacifiCorp during these proceedings." The issue of what roles Sierra Club and PacifiCorp would be allowed to play was then specifically included on the agenda at the next monthly Board meeting. At that July 6, 2005 Board meeting, the Board and its counsel solicited and received input on the nature and extent of the role that Sierra Club and PacifiCorp would play in the proceedings. After receiving that input, the Board concluded that the amicus parties "would be allowed to submit briefs on any dispositive motions, and pre-hearing and post-hearing briefs. They would also participate in oral arguments on those matters." The Board also indicated that the amicus parties would be "allowed to attend depositions." *See* 7/6/05 Board minutes attached hereto as Exhibit D. Following that Board meeting, the Board issued a Schedule for Discovery and Other Pre-Hearing Matters with specific deadlines for, among other things, depositions, submitting briefs on dispositive motions, submitting response/opposition briefs on dispositive motions, submitting reply briefs on dispositive motions, pre-hearing conference, etc. On or around December 23, 2005, the parties discussed an amended schedule, prepared a proposed amended schedule, and submitted it to the Board. On January 4, 2006, the Board approved the Amended Schedule. *See* Amended Schedule attached hereto as Exhibit C.

Notwithstanding every good-faith attempt by the Board, the Executive Secretary and the parties to accommodate and include Sierra Club in the planning and procedural aspects of this proceeding, at its own initiative Sierra Club has now opted to decline any further participation.

C. Sierra Club has Waived and Foregone its Opportunity to Address the IGCC/BACT Legal Issue

The IGCC/BACT Legal Issue is not a factual issue, but rather a legal issue that will be resolved by statutory and regulatory interpretation.[2] In its Declination Letter Sierra Club complains at some length that had it been allowed to intervene, it would have would have conducted its own discovery, taken its own depositions, introduced evidence that is not before the Board, filed its own request for admissions, etc. Of course, any such factual discovery that Sierra Club may or may not have undertaken is irrelevant to the IGCC/BACT Legal Issue. Such hypothetical factual discovery may be relevant to some of the factual issues reflected in SCC's other thirteen claims, but it is clearly not relevant to SCC's Claim #3 – the IGCC/BACT Legal Issue.[3]

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[2] This dispute will be resolved by an interpretation of the definition of the term BACT as contained in existing state rules. BACT requires that "production processes and available methods, systems and techniques" that are potentially applicable to the proposed source be included in a BACT analysis. UAC R307-401-6(1). However, BACT does not require that altogether different "alternatives" to the proposed source, that would replace the proposed source with a different type of source, be included in the BACT analysis. Instead, the BACT analysis need only identify the "available control technologies" for the particular emission source that the applicant has elected to propose. In this case, the applicant, Sevier Power, has elected to propose a CFB Boiler emission source. Sevier Power has not proposed a geothermal source, or a gas-fired source, or an IGCC source; rather, Sevier Power has proposed a CFB Boiler source. See PacifiCorp's Reply to the Sevier County Citizens for Clean Air and Water's Opposition Brief filed separately in this matter.

[3] The EPA and several states have already squarely addressed and unequivocally interpreted the BACT definition in a manner that is flatly contrary to the interpretation urged by SCC and Sierra Club. In a recent December 13, 2005 letter from Stephen D. Page, Director of EPA's Office of Air Quality, Planning and Standards, attached hereto as Exhibit E, EPA has reaffirmed its long-established policy of not requiring IGCC to be considered in such BACT analyses ("EPA's Reaffirmation Letter"). *See* EPA's Reaffirmation Letter attached hereto as Exhibit E. In EPA's Reaffirmation Letter, it confirmed that "[a]s noted in prior EPA decisions and guidance, *EPA does not consider the BACT requirement as a means to redefine the basic design of the source or change the fundamental scope of the project when considering available control alternatives*. For example, we do not require applicants proposing to construct a coal-fired steam electric generator to consider building a natural gas-fired combustion turbine as part of a BACT analysis, even though the turbine may be inherently less polluting . . . ." (emphasis added). The EPA concludes by stating that "we would not include IGCC in the list of potentially applicable control options that is compiled in the first step of a top-down BACT analysis. Instead, we believe that an IGCC facility is an alternative . . . ." This IGCC/BACT Legal Issue will be resolved by mere interpretation of the regulatory BACT definition. See PacifiCorp's Reply to the Sevier County Citizens for Clean Air and Water's Opposition Brief filed separately in this matter.

D. **It is the Board's Prerogative, not Sierra Club's, to Determines the Circumstances Under Which Important Legal Issues will be Considered**

Although UDAQ and the Executive Secretary have already twice considered and resolved the IGCC/BACT Legal Issue, to PacifiCorp's knowledge the issue has never been considered and resolved by the Board. Although the Board has given Sierra Club the unfettered opportunity to fully brief and argue the IGCC/BACT Legal Issue as afforded under the Utah Rules of Civil Procedure, and the same unfettered opportunity as afforded to all of the other parties (full and amicus) in this proceeding, Sierra Club has decided that unless it can conduct all of its factual discovery, and brief and argue all of the factual issues, at the same time as a full party, it does not want to brief and argue this IGCC/BACT Legal Issue separately.

It is the parameters of the Utah Rules of Civil Procedure and the prerogative of the Board that dictate the time, place, nature and circumstances under which parties may present their arguments in a give case – not the individual whims of the involved parties.[4]

It appears that the Board intends to consider and resolve the IGCC/BACT Legal Issue in the context of SCC's Second RFA. The Board has gone to great lengths to ascertain who should and who should not have full party status, who should and who should not have amicus status, when briefs should submitted, when oral argument should be heard, etc. The stage is now set for the Board to determine what it considers should be the State of Utah's policy on the IGCC/BACT Legal Issue. The Board, the Executive Secretary, the actual parties, the amicus parties, and numerous other entities and individuals have devoted considerable time and resources in getting the IGCC/BACT Legal Issue to the point where it can now be resolved. If

[4] If Sierra Club simply needed to fine-tune the parameters of the amicus status that the Board had granted, it could and should have taken the opportunity to do so promptly after the issuance of the May 12, 2005 Order denying intervention but granting amicus status. In the Order, the Board expressly stated, under the caption Notice of the Right to Apply for Reconsideration or Review, that "[w]ithin 20 days . . . any party shall have the right to apply for reconsideration with the Board." Sierra Club opted not to apply for reconsideration, but instead submitted a Petition for Judicial Review to the Utah Court of Appeals.

the Sierra Club chooses not to participate in the process for potentially resolving the IGCC/BACT Legal Issue, Sierra Club should not hereafter be allowed to resurrect the resolved dispute in another context at some future date.

E. Sierra Club's and SCC's Interests are Indeed the Same as to the IGCC/BACT Legal Issue

Sierra Club goes to great length in its Declination Letter to attempt to distance itself from SCC, all in an effort to reserve for itself the opportunity to get another bite at the apple in the event that any of the issues in SCC's Second RFA are resolved adversely to SCC and Sierra Club. Curiously, Sierra Club argues that it has "consistently argued that its interests are not the same as the interests of Sevier Citizens and that the Sierra Club's interests relative to the Sevier Power Company Power Plant are unique and distinct." Irrespective of whether the Sierra Club and SCC's interests are exactly the same on every issue asserted in their respective requests for agency action, on at least one issue their interests and positions are exactly the same – the IGCC/BACT Legal Issue. SCC and Sierra Club have both consistently argued that the applicable BACT regulation should be interpreted to require the inclusion of IGCC in a BACT analysis. This is a yes or no issue; one does not partially include or partially exclude IGCC in a BACT analysis; Sierra Club and SCC are either both right or they are both wrong on this point. Indeed, on this issue their interests are exactly aligned. Sierra Club should not be allowed to "sit out" the very proceeding in which this important legal and policy issue may potentially be resolved only to ask the Board to revisit the IGCC/BACT Legal Issue at some future date on the asserted basis that its interests are not the same as SCC's on this issue.

III. CONCLUSION

Sierra Club missed its deadline for filing any dispositive motion or any opposition to the Executive Secretary's Motion for Judgment on the Pleadings. Although Sierra Club has been

given every opportunity to participate in the potential resolution of the IGCC/BACT Legal Issue, it has affirmatively opted not to participate any further. As a result, Sierra Club has waived and foregone its opportunity to address the IGCC/BACT Legal Issue. It is the Board's prerogative, not the Sierra Club's, to determine the circumstances under which important air quality legal issues will be resolved. Finally, Sierra Club's and SCC's interests, at least on the IGCC/BACT Legal Issue, are the same. Accordingly, for these reasons, PacifiCorp respectfully requests that the Board not recognize or give any weight to the Sierra Club's Declination Letter and that the Sierra Club should not be allowed to have the Board revisit the IGCC/BACT Legal Issue in another context at some future date.

Dated this 20th day of March, 2006.

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Michael G. Jenkins,
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2006, I mailed a true and correct copy of the foregoing **PACIFICORP'S REPLY TO THE SIERRA CLUB AND GRAND CANYON TRUST'S DECLINATION TO PARTICIPATE ANY FURTHER AS AMICUS,** via U.S. First Class Mail, to the following:

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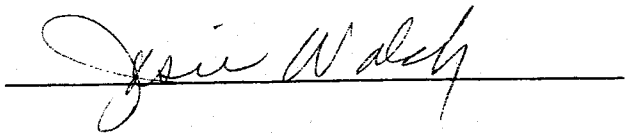

Exhibit A

BEFORE THE
UTAH AIR QUALITY BOARD

In the Matter of:	*	
	*	Order re Petitions to Intervene
Sevier Power Company Power Plant Sevier County, Utah DAQE-AN2529001-04	*	
	*	

On April 13, 2005, parties and participants appeared before the Utah Air Quality Board in the above-entitled matter for hearing on petitions to intervene by Sierra Club and Grand Canyon Trust, Sevier County Citizens for Clean Air and Water, and PacifiCorp. Joro Walker and Sean Phelan appeared for Sierra Club and Grand Canyon Trust, James O. Kennon and Cindy Roberts appeared for Sevier County Citizens for Clean Air and Water, Fred W. Finlinson appeared for Sevier Power Company, Michael Jenkins and Martin Banks appeared for PacifiCorp, and Richard Rathbun and Christian Stephens appeared for the Executive Secretary. Utah Air Quality Board members present were John Veranth, Dianne Nielson, Jerry Grover, James Horrocks, Richard Olson, Jeffrey Utley, Marcelle Shoop, and Ernest Wessman. Mr. Wessman recused himself because of his employment relationship with PacifiCorp. Fred Nelson acted as counsel for the Board.

1. By pleading dated November 12, 2004, the Utah Chapter of the Sierra Club and Grand Canyon Trust (collectively referred to herein as "Sierra Club") filed a Request for Agency Action seeking review of the October 12, 2004 decision by the Executive Secretary of the Utah Air Quality Board to issue an Approval Order granting a permit to Sevier Power Company to construct and operate a coal-fired power plant in Sevier County, Utah. The Sierra Club and

Grand Canyon Trust also filed a Statement of Standing and Petition to Intervene. Sevier Power Company filed an opposition to the Sierra Club petition to intervene. The Executive Secretary filed a response not opposing the petition. Sierra Club filed a reply.

2. By pleading dated November 1, 2004, the Sevier County Citizens for Clean Air and Water (Sevier Citizens) filed a Request for Agency Action appealing the Approval Order granting a permit to Sevier Power Company to construct and operate a coal-fired power plant in Sevier County, Utah, and petitioned to intervene in the proceeding. Sevier Power Company did not contest the standing of Sevier Citizens. The Executive Secretary filed a response objecting to the Sevier Citizens petition. Sevier Citizens filed a reply to the Executive Secretary's response providing a more specific description of the basis for its petition and providing affidavits and further information with respect to its petition to intervene. At hearing, the Executive Secretary represented he no longer opposed intervention by Sevier Citizens.

3. By pleading dated January 4, 2005, PacifiCorp filed a Petition to Intervene in the above-captioned proceeding, and included a Statement of Standing. The Sierra Club and Executive Secretary filed responses opposing intervention by PacifiCorp. PacifiCorp filed replies.

Parties and Intervention

Pursuant to UAC R307-103-6, the Executive Secretary and Sevier Power Company are considered to be parties to the proceeding. Sierra Club and Grand Canyon Trust and Sevier Citizens must be granted intervention by the Board under UAC R307-103-6 in order to go forward with their Requests for Agency Action. PacifiCorp must be granted intervention in order to participate as a party in the proceedings.

The rules of the Board provide that a petition to intervene must meet UCA Section 63-46b-9 which requires a demonstration "that the petitioner's legal rights or interests are substantially affected by the formal adjudicative proceeding, or that the petitioner qualifies as an intervenor under any provision of law." The Board shall grant a petition to intervene if it determines that

"(a) the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding; and

"(b) the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention."

Further, the Board rules provide that "[n]o person may initiate or intervene in an agency action unless that person has standing. Standing shall be evaluated using applicable Utah case law." UAC Section R307-103-6(3). Under Utah case law, standing is established under one of three general rules. First, a plaintiff may show some distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute. If a plaintiff cannot meet the first standard, standing may still be established for important public issues if no one else has a greater interest in the outcome and the issues are unlikely to be raised at all unless that plaintiff has standing to raise the issues. Finally, a plaintiff may maintain a suit in a case that raises issues that are so unique and of such great importance that they ought to be decided in furtherance of the public interest. *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909, 913 (Utah 1993).

Two additional principles, here applicable, are one, that if an association seeks standing, it must show that its individual members have standing. *Sierra Club v Dept. Of Environmental*

Quality, 857 P.2d 982, 986 n.8 (Utah App. 1993), and two, the burden of proof is on the applicant to establish standing. *Washington County Water Conservancy District v. Morgan*, 82 P.3d 1125 (Utah Ct. App. 2003).

Intervention of Sevier Citizens

The Board grants the Petition to Intervene of Sevier Citizens on two bases. First, in its response, Sevier Citizens identifies its allegations challenging the issuance of the permit by the Executive Secretary and presents information, statements, and petitions from approximately 500 members of Sevier Citizens who express concerns and raise issues with respect to the proposed plant. Sevier Citizens represents members who live in close proximity to the proposed plant site. The Board finds that based on the composition of the organization and the issues raised that Sevier Citizens is the most appropriate entity to bring the action. Second, the Board finds that Sevier Citizens has alleged, through affidavits and information from its members, a distinct and palpable injury resulting from the Executive Secretary's granting of the permit. Affidavits and statements include not only assertions of effect on visibility and the environment but contain specific claims of potential for or exacerbation of identified respiratory illnesses and other physical conditions on members and their families who live in close proximity to the proposed plant (See Attachment A of Sevier Citizens Response to Executive Secretary's Comments, dated March 16, 2005). The Board, therefore, finds Sevier Citizens has met the requirements for intervention.

Intervention of Sierra Club

The Board denies intervention to the Sierra Club. Sierra Club has standing to pursue its petition only if it can establish that it has a distinct and palpable injury resulting from the

Executive Secretary's granting of the permit, that it is the most appropriate plaintiff to bring the action, or that it raises issues of such public importance that they ought to be decided in furtherance of the public interest. Sierra Club failed to meet any of these criteria.

Sierra Club presented affidavits from three of its members to support its claim of distinct and palpable injury. Brian Cass, an Arizona resident, who owns a home in Boulder, Utah, alleges that emissions from the plant would affect visibility on the Colorado Plateau and therefore impact his activities as a videographer and a person who recreates in the area. He also expresses a belief that emissions will impair his and his family's health when in Utah. He expresses concern that the value of his property would decrease and emissions would contribute to global warming. Howard Cherry, a resident of Salina, Utah, alleges that emissions from the plant would impact visibility, his health, the value of his property, and that emissions would contribute to global warming. Cindy Roberts, a resident of Sigurd, Utah, alleges she is concerned about the effect of plant emissions on soils, waterways, fish and wildlife in the area, and her family farming operations, the effect on her health and the health of her family and neighbors, and effect on property values. Ms. Roberts also submitted a statement as a member of Sevier Citizens and, as noted above, appeared on their behalf at the hearing on the petitions to intervene.

The Board finds that the Sierra Club has not met its burden of proof by demonstrating distinct and palpable injury. The allegations of effect on visibility, the environment, concern for public health, and global warming are general public concerns that do not establish a personal, particularized stake in the issuance of the permit. These general allegations raised by Sierra Club members do not rise to the level of being a demonstration of a distinct and palpable injury. Further, no evidence is proffered that the general allegations of adverse impact on Sierra Club

members are caused by the Executive Secretary's issuance of the Sevier Power Company's approval order. These interests asserted by the members of the Sierra Club are interests that are shared in common by other members of the public at large and are not particularized. Finally, the affidavits do not demonstrate a connection between the alleged improper permitting actions and a particular injury to the three affiants.

In addition, the Board finds that the issuance of the approval order for the Sevier Power Company and information presented to the Board do not establish Sierra Club as the most appropriate entity to present public issues nor are the issues raised of such great importance that would warrant standing being granted to the Sierra Club without a demonstration of particularized injury. The Board has concluded that Sevier Citizens is the most appropriate party to present issues as discussed above. Further, the Board does not consider the issuance of a permit to Sevier Power Company to be a unique matter of significant public importance that would warrant granting the petition to intervene. There are numerous other coal-fired plants that are currently permitted in Utah. The rules of the Board outline a process for receiving public input on permits pending before the Executive Secretary. Pursuant to UAC R307-401-4, the public is invited to comment on proposed approval orders. Sierra Club submitted comments and the Executive Secretary considered those comments in issuing the permit to the Sevier Power Company. This process, in addition to the process of allowing petitions for rulemaking or requests to the Board to establish policy positions on issues of public interest, are proper legal forums for persons and organizations without particularized injury to have their issues considered. Unless a distinct and palpable injury is demonstrated, or another of the standing tests is met, the adjudicative process is not available to challenge a decision by the Executive

Secretary to grant a permit. This result constitutes a balancing of the interests and legal rights of those obtaining a permit with the right to challenge the permit if injury is demonstrated.

Intervention by PacifiCorp

The Board denies the Petition to Intervene of PacifiCorp. PacifiCorp petitioned to intervene based on an affidavit from Bill Lawson, Thermal Plant Environmental Manager, that it had an interest in the proceeding. Mr Lawson asserts that PacifiCorp has a pending permit application for Hunter Unit 4 that could be affected by the Board's decision on the issues being presented to the Board in this matter. PacifiCorp also argues that the Board's decision could have an effect on other PacifiCorp power plants and possible modification of those plants in the future.

The Board denies the Petition to Intervene of PacifiCorp. Consideration of requests for approval orders from the Executive Secretary under the current rules of the Board are on a case-by-case specific determination applying the standards identified in the rules, and PacifiCorp has appropriate legal remedies to challenge any permit issued to it by the Executive Secretary. Further, PacifiCorp has not demonstrated that it has or would suffer a distinct and palpable injury from the issuance of the permit to the Sevier Power Company. Rulings of the Board in an adjudicatory proceeding are specific to the issues presented. Any decision that may result in significant impacts to members of the general public or entities in the power industry could necessitate subsequent rulemaking by the Board. Also, PacifiCorp may present to the Board rulemaking petitions or requests for consideration of policy issues, which may not be in the context of a specific adjudicatory proceeding, but are available legal avenues for presenting its concerns.

Amicus Status for Sierra Club and PacifiCorp

The Board recognizes the value of receiving input from the Sierra Club and PacifiCorp on issues raised in this adjudicatory proceeding. Therefore, the Board grants Sierra Club and PacifiCorp amicus status in the proceeding to present briefs and oral argument on issues as will be further defined by the Board.

DATED this 12 day of May, 2005.

John Veranth

Utah Air Quality Board

Notice of the Right to Apply for Reconsideration or Review

Within 20 days after the date this final order is signed in this matter by the Utah Air Quality Board, any party shall have the right to apply for reconsideration with the Board, pursuant to Utah Code Ann. § 63-46b-13. The request for reconsideration should state the specific grounds upon which relief is requested and should be submitted in writing to the Board at 168 North 1950 West, Salt Lake City, Utah, 84114. A copy of the request must be mailed to each party by the person making the request. The filing of a request for reconsideration is not a prerequisite for seeking judicial review of this Order.

Notice of the Right to Petition for Judicial Review

Judicial review of this Order may be sought in the Utah Court of Appeals under Utah Code Ann. § 63-46b-16 and the Utah Rules of Appellate Procedure by the filing of a proper petition within thirty days after the date of this Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2005, I caused a copy of the forgoing Order re Petitions to Intervene to be mailed by United States Mail, postage prepaid, to the following:

Joro Walker
Sean Phelan
Western Resource Advocates
1473 S 1100 E Suite F
Salt Lake City, Utah 84105

Rick Sprott, Executive Secretary
Utah Division of Air Quality
150 North 1950 West
Salt Lake City, Utah 84114

Chris Stephens
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/s/ Fred G Nelson /kp
Fred G Nelson
Counsel, Utah Air Quality Board
160 East 300 South 5th Floor
Salt Lake City, Utah 84114-0873

Exhibit B

WESTERN RESOURCE ADVOCATES

Advancing Solutions for the Western Environment

March 13, 2006

Utah Air Quality Board
150 North 1950 West
Salt Lake City, Utah 84114

Re: Declining to Participate as Amicus in the Matter of Sevier Power Company Power Plant (DAQE-AN2529001-04).

Dear Utah Air Quality Board Members:

Sierra Club and Grand Canyon Trust (collectively Sierra Club) appreciate your efforts to keep us apprised of the proceedings in the Sevier Power Company Power Plant matter currently before the Utah Air Quality Board (Board). At this time, Sierra Club wishes to make clear that it respectfully declines to participate in this matter as an amicus. We also emphasize that, as anything less than a full party, Sierra Club cannot adequately represent its interests in any proceeding before this Board adjudicating the legality of the air quality permit issued to Sevier Power Company. Finally, we underscore that Sierra Club is in no way in privity with Sevier County Citizens for Clean Air and Water (Sevier Citizens) with regard to any of the issues or claims raised by that organization and currently pending before the Board.

As you are aware, Sierra Club asked for and was denied by this Board full party status to adjudicate the claims raised in its Request for Agency Action relative to the Sevier Power Company Power Plant. Sierra Club has appealed that denial and that appeal, fully briefed and argued, is now pending before the Utah Supreme Court. Immediately after the Board denied it standing to adjudicate its Request for Agency Action, Sierra Club filed a motion with the Board asking it to stay the Sevier Citizens adjudication because, *inter alia*, Sierra Club would be harmed should an adjudication go forward without Sierra Club's full participation. The Board denied Sierra Club's motion.

In lieu of allowing it adjudicate its own Request for Agency Action, the Board determined that Sierra Club could participate as an amicus in the Sevier Citizens adjudication of that organization's Request for Agency Action. According to the record, as an amicus, Sierra Club would not be allowed "to conduct discovery, examine witnesses or present other evidence . . . [or] to create or expand the scope of issues (claims or defenses) to be considered by the Board."

Colorado Office • 2260 Baseline Road, Suite 200 • Boulder, CO 80302 • 303-444-1188 • Fax: 303-786-8054 • E-mail: info@westernresources.org
Utah Office • 425 East 100 South • Salt Lake City, UT 84111 • 801-487-9911 • E-mail: utah@westernresources.org
www.westernresourceadvocates.org

Letter from Richard K. Rathbun, (former) Counsel to Executive Secretary, to All Parties/Counsel of Record, *Re: Proposed Schedule for Discovery and Other Pre-hearing Matters* (June 23, 2005); see also Minutes of Utah Air Quality Board (July 6, 2005). Therefore, as an amicus, Sierra Club would be prohibited from, for example, introducing documents and data, taking depositions or presenting its own expert witnesses relative to any claim or pleading, such as the recently filed Executive Secretary's Memorandum in Support of Motion for Judgment on the Pleadings. In addition, Sierra Club would be prevented from appealing any decision of the Board, including a decision on purely legal issues. Thus, Sierra Club would be prevented from adequately representing its own interests.

Moreover, Sierra Club has consistently argued that its interests are not the same as the interests of Sevier Citizens and that the Sierra Club's interests relative to the Sevier Power Company Power Plant are unique and distinct. In addition, were Sierra Club to litigate issues presented in its Request for Agency Action, including issues that are similar to those now before the Board, Sierra Club would introduce evidence that is not currently before the Board, would present its own expert witnesses, would conduct discovery, including requests for admission and depositions of agency staff, and would make arguments based on that evidence and discovery that Sevier Citizens has not made and will not make. As an amicus, Sierra Club would not be able to take these steps and therefore would be unable to fully and fairly litigate its interests. As a result, Sierra Club is not and never has been in privity with Sevier Citizens.

Finally, Sierra Club repeats that its appeal before the Supreme Court is fully briefed and argued and therefore may be decided soon. As a result, the organization asks the Board to reconsider its decision not to postpone its adjudication of the Sevier Citizens Request for Agency. Rather, Sierra Club asks that the Board stay this adjudication until the Utah Supreme Court determines whether Sierra Club has standing to pursue its Request for Agency Action.

Thank you for your consideration of this matter. We ask that you continue to serve on counsel for the Sierra Club all pleadings and other documents related to the Sevier Power Company Power Plant matter.

JORO WALKER
SEAN PHELAN
Attorneys for Sierra Club and
Grand Canyon Trust

Cc:

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Assistant General Counsel
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Exhibit C

BEFORE THE UTAH AIR QUALITY BOARD

SEVIER COUNTY CITIZENS FOR CLEAN AIR AND WATER, Petitioner, and SEVIER POWER COMPANY; and the EXECUTIVE SECRETARY of the UTAH AIR QUALITY BOARD, Respondents.	**ORDER REGARDING AMENDED SCHEDULE FOR DISCOVERY AND RELATED MATTERS**

Pursuant to the stipulation of the parties, the Utah Air Quality Board hereby orders and approves the following amended discovery schedule for the above-encaptioned matter:

ITEM	DATE
Discovery begins	Currently underway
Discovery ends	Monday, January 30th
Deadline to file dispositive motions	Monday, February 27th
Parties exchange lists of witnesses (both fact and expert)	Wednesday, February 15th
Responses/ Opposition memos, etc. re any dispositive motions	Monday, March 13th
Replies (by moving parties)	Monday, March 20th
Board to consider motions or set date for further proceedings	April Board meeting
Pre-hearing conference of parties to discuss status, hearing dates, etc.	April Board meeting
Hearing on the merits	May Board meeting

Dated this 4th day of January, 2006.

UTAH AIR QUALITY BOARD

By: _____

1/4/06

Exhibit D

UTAH AIR QUALITY BOARD MEETING
July 6, 2005

MINUTES

I. Call to Order.

John Veranth called the meeting to order at 1:05 p.m.

Board members present:

Nan Bunker	Dianne Nielson	Marcelle Shoop
Jerry Grover	Wayne Samuelson	John Veranth
Jim Horrocks	JoAnn Seghini	Ernest Wessman

Acting for Executive Secretary: Cheryl Heying

II. Next Meeting.

August 3, 2005, and September 7, 2005.

III. Minutes.

There was one correction in the court reporter minutes located on page 48, line 22. The word "coal" in the phrase "coal technology mean," should be changed to "control."

- Jim Horrocks moved to approve the minutes, Nan Bunker seconded, and the Board approved unanimously.

IV. Election of Board Chair and Vice Chair.

- Jim Horrocks moved to nominate John Veranth as Board Chairman, and Wayne Samuelson seconded. Motion to close nominations by Nan Bunker and seconded by Wayne Samuelson. The Board approved the nomination unanimously.

- Jim Horrocks moved to nominate Ernest Wessman as Board Vice Chairman, and Wayne Samuelson seconded. Motion to close nominations by Nan Bunker and seconded by Marcelle Shoop. The Board approved the nomination unanimously.

Note: The agenda items were presented out of order, but for the minutes, they will be presented in order.

SIP demonstration to determine compliance with the NAAQS. Instead, the PSD program evaluates the affect of a new source based on current ambient measurements. Ms. Delaney gave an example of a new 500 ton SO2 source that would be located in Salt Lake County. Under the new rule R307-421, that source would be required to obtain SO2 offsets to address the secondary formation of PM10 in the Salt Lake County maintenance area. The offsets could be obtained from banked emissions. That same source would also be evaluated under the PSD program for impact on the SO2 NAAQS. The emissions from the new source would be modeled using current ambient SO2 levels as the background to see if the source would cause a violation of the SO2 NAAQS. Banked emissions would not be a part of this modeling. The SO2 increment consumption would also be evaluated. The source would not be evaluated under the PSD program for PM10 because precursors are not currently addressed in the PSD program.

Ms. Shoop asked for a more detailed explanation for why the staff was recommending changing the definition of baseline date. Ms. Delaney explained that a major baseline date of January 5, 1975 corresponded to the date of the first PSD program. EPA wanted to give credit to sources that reduced emissions after this date, even though the minor source baseline date had not been triggered. In 1975 four counties along the Wasatch Front were nonattainment for TSP and Salt Lake County was nonattainment for SO2. If 1975 is considered the major source baseline date in these areas, then all of the emission reductions that occurred to bring these areas into attainment for the TSP and SO2 NAAQS (and the subsequent PM10 NAAQS) would essentially expand the increment to a level that exceeds the NAAQS. This would make an increment analysis meaningless because a new source would cause a violation of the NAAQS well before the source approached the baseline level, much less the increment of degradation that is allowed beyond that baseline level. The CAA does not address the transition of nonattainment areas to the PSD program, and it is contrary to the overall purpose of PSD to expand increment while the area is nonattainment. By making the major source baseline date the date that the area is redesignated to attainment, the PSD increment becomes meaningful, and allows growth in emissions in the area, without completely eroding the gains that have been made due to the TSP, SO2 and PM10 SIPs. The PSD program focuses on keeping clean areas clean. EPA's comments on this rule change asked for further justification of how this would be permitted under the language of the CAA. UDAQ will continue to discuss this with EPA.

- Dianne Nielson moved to approve the adoption of new rule R307-421, and modify R307-101-2 "Baseline Date" to July 6, 2005. JoAnn Seghini seconded and the Board approved unanimously.

VIII. Scheduling of Discovery Matters for NEVCO Appeal and Determination of Role of Amici Curiae. Presented by: Fred Nelson.

Mr. Nelson reported that the parties had met and agreed upon a schedule to handle the hearing in this matter. The discovery process will occur up through the first part of October 2005. There will be a certain time frame to file motions. The Board will hear any motions in November 2005, and set a hearing date at that time. All parties will follow R307-103. Mr. Nelson discussed the role of the amicus parties that they would be allowed to submit briefs on any dispositive motions and pre-hearing and post-hearing briefs. They would also participate in oral arguments on those matters. The amicus parties will not be allowed to do discovery, but will be allowed to attend depositions.

Ernie Wessman recused himself from this item.

- JoAnn Seghini moved that the Board accept the schedule and description of the amicus status. Nan Bunker seconded and the Board approved unanimously.

IX. **Propose For Final Adoption: R307-101-2, Update Definition of Volatile Organic Compounds.** Presented by: Jan Miller.

Ms. Miller reported that the update went out for public comment and was followed by a public hearing. No one attended the hearing, and no comments were received. Staff recommends the proposal be adopted.

- Ernie Wessman moved to approve R307-101-2, Update Definition of Volatile Organic Compounds. Jerry Grover seconded and the Board approved unanimously.

X. **Propose To Approve Five-Year Reviews and Continuation of Rules:** Presented by Jan Miller.

A. **R307-115, General Conformity.**

B. **R307-320, Davis, Salt Lake and Utah Counties, and Ogden City: Employer-Based Trip Reduction Program.**

Ms. Miller reported to the Board that Title 40, Part 93, Subpart B, of the Code of Federal Regulations, requires that states set up procedures for federal agencies to follow to determine that projects do not interfere with SIP plans. Subpart B meets that requirement and has been approved by EPA. There have been no amendments to Subpart B and no need to change R307-115.

- Jim Horrocks moved to approve R307-115, General Conformity and Marcelle Shoop seconded and the Board approved unanimously.

Ms. Miller explained that rule R307-320 is part of the Ozone Maintenance Plan. The state statue allows the Board to apply the rule to federal, state and local government agencies, including school districts. It can also be applied to private business, but that has never been done. There are about 80 agencies that are affected by this rule. The Bureau of Reclamation has the lowest drive-alone rate at 35%. This program began in 1994 with UTA doing most of the promotional work. DAQ collects statistics once each year.

- Jerry Grover moved to approve the Five-Year Reviews and Continuation of Rules B. R307-320, for Davis County, Salt Lake County, Utah County, and Ogden City: Employer-Based Trip Reduction Program. Wayne Samuelson seconded and the Board approved unanimously.

Cheryl Heying presented the advertisements that Environmental Quality has placed in the Deseret News and Salt Lake Tribune regarding the Choose Clean Air Campaign.

XI. **Propose to Approve to Modify the Equipment Requirement in Approval Order DAQE#862-01 or Kennecott Copperton Concentrator Site.** Presented by: Nando Meli.

Exhibit E

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

DEC 13 2005

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

Mr. Paul Plath
Senior Partner
E3 Consulting, LLC
3333 South Bannock Street, Suite 740
Englewood, Colorado 80110

Subject: Best Available Control Technology Requirements for Proposed Coal-Fired Power Plant Projects

Dear Mr. Plath:

Your firm's letter to me dated February 28, 2005, from D. Edward Settle, asks for the U.S. Environmental Protection Agency's (EPA) position regarding whether an analysis of Best Available Control Technology (BACT) for proposed coal-fired power plants must specifically include evaluation of alternative designs of coal-fueled processes such as integrated gasification combined cycle (IGCC). Generally, the Clean Air Act (CAA) requires an applicant to apply BACT as a condition for issuance of a prevention of significant deterioration (PSD) construction permit in an attainment area. This response provides EPA's view of how the CAA should be interpreted and EPA regulations applied under the particular circumstances presented based on prior EPA policy statements and adjudicatory decisions.

There are two different parts of the PSD permitting process where consideration of alternative designs or production processes may occur. One part is under Section 165(a)(2) where it is required that the permitting authority allow an "opportunity for interested persons ... to appear and submit written or oral presentations on the air quality impact of such source, ***alternatives thereto***, control technology requirements, and other appropriate considerations" (emphasis added). The other part is section 165(a)(4), which requires that a proposed facility subject to PSD apply BACT. In Section 169(3) of the CAA, BACT is defined as "an emission limitation based on the maximum degree of reduction ... which the permitting authority ... determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant."

EPA's view is that, through this language, Congress distinguished "production processes and available methods, systems and techniques" that are potentially applicable to a particular type of facility and should be considered in the analysis of BACT from "alternatives" to the proposed source that would wholly replace the proposed facility with a different type of facility. Although we read this language to draw such a distinction, in practice, it is often not clear when another production process should be considered to fit within the BACT definition and when it should be considered an alternative to the proposed source. This distinction is especially difficult to make for coal gasification because the definition of BACT includes "innovative fuel combustion techniques" in a list of examples of production processes or available methods, systems, or techniques to be considered in the BACT analysis. However, even assuming that coal gasification were in all respects an innovative fuel combustion technique for producing electricity from coal, we do not believe Congress intended for an "innovative fuel combustion technique" to be considered in the BACT review when application of such a technique would redesign the proposed source to the point that it becomes an alternative type of facility, which, as discussed below, we believe would be the case if IGCC were applied to a proposed SCPC unit.

As noted in prior EPA decisions and guidance, EPA does not consider the BACT requirement as a means to redefine the basic design of the source or change the fundamental scope of the project when considering available control alternatives. For example, we do not require applicants proposing to construct a coal-fired steam electric generator to consider building a natural gas-fired combustion turbine as part of a BACT analysis, even though the turbine may be inherently less polluting per unit product (in this case electricity). In re SEI Birchwood Inc, 5 E.A.D. 25 (1994); In re Old Dominion Electric Cooperative, 3 E.A.D. 779 (1992).

Therefore, the question in this instance is whether IGCC results in a redefinition of the basic design of the source if the permittee is proposing to build a supercritical pulverized coal (SCPC) unit. In this situation, EPA's view is that applying the IGCC technology would fundamentally change the scope of the project and redefine the basic design of the proposed source. Portions of an IGCC process are very similar to existing power generation designs that we have previously identified as a redefinition of the basic design of source when an applicant proposed to construct a pulverized coal-fired boiler. The combined cycle generation power block of an IGCC employs the same turbine and heat recovery technology that is used to generate electricity with natural gas at other electrical generation facilities. As noted above, we do not require applicants proposing to construct a coal-fired steam electric generator to consider building a gas-fired combustion turbine as part of a BACT analysis. Furthermore, the core process of gasification at an IGCC facility is more akin to technology employed in the refinery and chemical manufacturing industries than technologies generally in use in power generation (i.e., controlled chemical reaction versus a true combustion process). This technology would necessitate different types of expertise on the part of the company and its employees to produce the desired product (electricity) than the typical SCPC unit. Therefore, where an applicant proposes to construct a SCPC unit, we believe the IGCC process would redefine the basic design of the source being proposed.

Accordingly, consistent with our established BACT policy, we would not require an applicant to consider IGCC in a BACT analysis for a SCPC unit. Thus, for such a facility, we would not include IGCC in the list of potentially applicable control options that is compiled in the first step of a top-down BACT analysis. Instead, we believe that an IGCC facility is an alternative to an SCPC facility and therefore it is most appropriately considered under Section 165(a)(2) of the CAA rather than section 165(a)(4).

Your letter did not specifically request guidance on whether IGCC should be considered in a LAER analysis for a SCPC, but I am taking this opportunity to address the issue. As with BACT, an applicant must generally comply with LAER as a condition for issuance of a nonattainment new source review (NSR) permit in a nonattainment area. Section 173(a)(5) of the CAA requires an applicant to conduct, "an analysis of ***alternative sites, sizes, production processes*** and environmental control techniques for such proposed source." (emphasis added). Because we believe IGCC results in a redefinition of the source in this situation, it should not be considered in a LAER analysis for a SCPC unit. Nonetheless, we believe that the technology should be considered under Section 173(a)(5) when an SCPC unit is proposed in nonattainment areas.

I trust that this response addresses the issues raised in your letter.

Sincerely,

Stephen D. Page
Director
Office of Air Quality, Planning
and Standards

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2006, I caused a copy of the foregoing to be mailed by United States Mail, postage prepaid, to the following:

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Sean Phelan
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D

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November 1, 2004

BEFORE THE EXECUTIVE SECRETARY
UTAH DIVISION OF AIR QUALITY

In Re: AUTHORIZATION TO CONSTRUCT A 270 MW COAL-FIRED POWER PLANT NEAR SIGURD, SEVIER COUNTY, UTAH TO NEVCO LLC
DAQE-AN2529001-04 Engineer- Mr. John Jenks

Pursuant to Utah Admin. RuleR307-103-3{1}, Sevier County Citizens For Clean Air And Water, [Sevier Citizens] herein demonstrates sufficient facts to establish standing to bring this Request For Agency Action to the Executive Secretary, Air Quality Board, Division of Air Quality, concerning the Intent To Permit, No. DAQE-IN2529001, issued to Sevier Power Company {NEVCO LLC}. Furthermore, Sevier Citizens hereby petitions to intervene in the Adjudication of the Sevier Power Company Permit, as required by Utah Admin. Code R307-103-6.

INTRODUCTION

On October 12,2004, by order of the Utah Division of Air Quality, through Executive Secretary of the Utah Air Quality Board, Rick Sprott, authorized NEVCO L.L.C. to construct a 270 MW coal-fired power plant near Sigurd, Sevier County, Utah. Sevier Citizens seek a formal proceeding according to Utah Admin. Rule 307-103-4. Sevier Citizens are a Party as covered under Utah Admin. Rule R307-103-6. As demonstrated herein, Sevier Citizen has a substantial interest in the Air Quality, Quality of Life, and ecological integrity of the Sevier Valley and nearby National Parks. Accordingly, Sevier Citizens petition to intervene should be granted because Sevier Citizens has standing to request action from the Utah Department of Air Quality [UDAQ] regarding the significant environmental impacts of the challenged UDAQ Permit.

ARGUMENT

Sevier Citizens suffer a "distinct and palpable injury" to it's interests relating to the Air quality, Quality of Life, and ecological functioning of the Sevier Valley and National Parks, that results from UDAQ authorization of the Sevier Power Company permit. As well, the authorization of this coal-fired plant raises important public issues the Sevier Citizens is properly situated to raise in an adjudicated forum. Furthermore, environmental impacts to the area National Parks, that are a major attraction for people around the world, raises issues of tremendous importance. Accordingly, pursuant to Utah Admin. Rules, Sevier Citizens has standing to bring this Request for Agency Action.

SEVIER CITIZENS HAS STANDING TO REQUEST AGENCY ACTION

A. SEVIER CITIZENS SUFFER A DISTINCT AND PAPABLE INJURY TO IT'S ENVIROMENTAL ITEREST THAT ATTACHES A PERSONAL STAKE IN THE OUTCOME OF UDAQ'S PERMIT.

Under the first standing standard, a party has standing to challenge governmental action when the challenged action gives rise to an injury to an established interest that attaches a personal stake in the dispute. More specifically, a party has a personal stake in the government's action when it establishes:

[1] the existences of an adverse impact on plaintiffs rights,[2]a casual relationship between the governmental action that is challenged and the adverse impact on the plaintiff's rights, and [3] the likelihood that relief requested will redress the injury claimed, Society of Professional Journalists V. Bullock, 743 P.2d 1166,1172-B [Utah 1987]

Here, the UDAQ authorized construction of a 270 MW coal-fired power plant has an adverse impact on Sevier Citizen's environment, ecological, aesthetic, financial, and public health interests that derive from preserving the air quality of Sevier County. The UDAQ authorized this construction and has the duty to administer the Utah Air Conservation Act and all Federal mandated Clean Air Provisions, as such, revocation of the permit will redress Sevier Citizens injuries.

1. THE SEVIER POWER COMPANY PERMIT ADVERSELY IMPACTS SEVIER CITIZENS ENVIRONMENTAL AND ECOLOGICAL INTERESTS.

Sevier Citizens mission is to preserve and protect the Air Quality and

Ecological interests of the Sevier Valley and surrounding National Parks. We are interested in increasing public awareness and appreciation of the beauty of our valley. Sevier County has approximately 19,091 [July 1, 2002] people living in 1,035 sq. miles of which approximately 80% of that is owned by the State and Federal governments. Our economic base is agriculture and a need exists to protect the dairies, fish hatcheries, and other agriculture operations as well. Many migratory birds visit the area to nest and raise their young.

Several homes in the area have family members that suffer from respiratory illness, severe allergies, and diabetes. Some have moved from more polluted areas in Northern Utah on advice of their doctors.

2. UDAQ AUTHORIZATION OF THE SEVIER POWER COMPANY PERMIT CAUSES SEVIER CITIZENS INJURY

UDAQ is charged with denying or approving permits pursuant to the Utah Clean Air Act. Accordingly, any injury that results from the authorization to construct this coal-fired power plant in Sevier Valley lies in the hands of the authorizing agency. The UDAQ has the responsibility to monitor the air in Sevier Valley on a regular basis to establish a long term base for the air quality in the valley.

3. THE REQUESTED RELIEF WILL REDRESS SEVIER

CITIZENS INJURY

Sevier Citizens seeks revocation of the Sevier Power Company permit to construct a 270 MW coal-fired power plant near Sigurd, Utah. The permit is the cause of injuries to Sevier Citizens. The requested relief would redress Sevier Citizens injury.

4. UDAQ'S AUTHORIZATION OF SEVIER POWER COMPANY RAISES FINANCAL ISSUES THAT NEED TO BE ADDRESSED.

Sevier Citizens have been financially injured and it will increase with the authorization of the permit. Real estate and agriculture interest in the area have already felt the loss . Investment of large sums of money in structures has taken place and the anticipated increase in value over a period of time are now in jeopardy.

B. UDAQ'S AUTHORIZATION OF SEVIER POWER COMPAMY TO CONSTRUCT A 270 MW COAL-FIRED POWER PLANT RAISES IMPORTANT PUBLIC ISSUES

The Air Quality of the Sevier Valley is of great importance to all citizens of Sevier County and the adjoining counties of Wayne, Sanpete, Millard, Juab and the entire State of Utah. This air shed is of great importance to the thousands of visitors that come to Utah to view the majestic National Parks in Southern Utah. Visibility ranks high on the list of

concerns for our area. The Sevier Valley is not protected by the Class 1 designation but contains some of the same beauty found in the National Parks. Sevier Citizens represents members from Northern Utah to the State of Texas. All of these people have a vested interest in this proposed power plant and have standing.

Because of the known detrimental impacts of selenium on wildlife and migratory birds, it brings forth important public issues. Temperature inversions that occur both summer and winter will threaten the ecosystem of nearby Rocky Ford Reservoir. The periods of inversions pose a threat to everyone and everything when the pollution spikes during those times.

II. SEVIER CITIZENS MEETS THE REQUIREMENTS NECESSARY TO INTERVENE IN THE SEVIER POWER COMPANY AUTHORIZATION

Pursuant to Utah Code 63-46b-9, a petition to intervene shall include: [1] the agency's file number or other reference number [2] the name of the proceeding [3] a statement of facts demonstrating an interest and substantially affected by the proceeding, [4] a statement of relief that the petition seeks from the agency. In accordance with this provision, Sevier Citizens seeks to intervene with a Request for Agency Action in UDAQ's Authorization to Construct a 270 MW coal-fired power plant by Sevier

Power Company Permit NO. DAQE-IN2529001-04. The aforementioned facts are sufficient to demonstrate an interest adversely affected by the authorized construction. Sevier Citizens request a revocation of Sevier Power Company [NEVCO] Permit.

As well, pursuant to Utah Code 63-46b-9 [2] the presiding officer shall grant a petition for intervention that [1] the petitioner's legal interest may be substantially affected by the formal adjudicative proceeding, and [2] the interest of justice and the orderly and prompt conduct of the adjudication proceeding will not be materially impaired by allowing the intervention. Throughout this document, Sevier Citizens has demonstrated that its environmental, ecological, aesthetic, quality of life, financial, and public health interests are at stake by this authorized construction of a coal-fired power plant so close to our communities. In further proceedings, Sevier Citizens will demonstrate that many potential negative impacts of this construction must be analyzed prior to UDAQ's authorization.

Finally, the interest of justice weighs in further proceedings or a revocation of Sevier Power Company Permit. No prejudice to any party will result from the resolution of Sevier Citizens concerns because Sevier Citizens Request for Agency Action is within time limits prescribed and anticipated by Utah Admin. Rules. Accordingly, Sevier Citizens meets the

requirements for intervention and standing to bring this Request for Agency Action.

CONCLUSION

As demonstrated above, Sevier Citizens has standing to Request Agency Action on Sevier Power Company [NEVCO's] permit. Sevier Citizens is adversely affected by the UDAQ's authorization of the permit, this authorization is the cause of Sevier Citizens injury, and the requested relief will redress Sevier Citizens injury. As well, Sevier Citizens concerns raises substantial public issues of great importance that warrants to Request Agency Action.

Furthermore, Sevier Citizens meets the requirement for intervention by demonstrating legally protectable, Quality of Life, Environmental, Aesthetic, Financial, and Public Health interests in the construction of this coal-fired power plant. These interests will be adversely affected unless the requested relief is granted through this process. Accordingly, Sevier Citizens is entitled to intervene with this Request for Agency Action.

Respectfully Submitted:

James O. Kennon, President

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Sevier County Citizens For
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BEFORE THE AIR QUALITY BOARD

In the Matter Of:

Sevier Power Company 270 MW Coal-fired Power Plant Sigurd, Utah Project Code: N2529-001 DAQE – AN2529001-04	*Sevier County Citizens for Clean Air & Water * Response to * Executive Secretary's * Comments On Sevier Citizens * Legal Right to Intervene and Have Standing

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Request for Agency Action

Sevier County Citizens for Clean Air & Water will respond to the Secretary's request for clarification of Sevier County Citizens for Clean Air & Water petition to Intervene and be granted Standing. This is to answer questions raised by counsel for the Executive Secretary, dated, January 28, 2005. This response is to be considered in addition to our Request for Agency Action, dated November 1, 2004

If anyone should be given the right to Intervene and have Standing, it should be Sevier County Citizens For Clean Air & Water. We are the people who will be living with the effects of the proposed coal-fired power plant.

Pursuant to Utah Admin. Code R307-103-3(2) and R307-103-6(3), Sevier County Citizens for Clean Air & Water [Sevier Citizens] herein demonstrates sufficient facts to establish Standing to bring a Request for Agency Action contesting the Utah Division of Air Quality's (UDAQ) Approval Order, dated October 12, 2004 and signed by the Secretary of Air Quality, Richard W. Sprott. The Approval Order for the Sevier Power Company (SPC) DAQE-AN 2529001) to construct and operate a 270 MW coal-fired power plant in Sigurd, Utah.

Sevier Citizens reaffirms our request to Intervene in the Adjudication of the Sevier Power Company's permit, as required by Utah Admin. Code R307-103-6(2)(c).

Introduction

The Executive Secretary, Richard W. Sprott, on October 12, 2004, issued an Approval Order to allow SPC to construct and operate a 270 MW coal-fired power plant near Sigurd, Utah. Sevier Citizens as described in Utah Admin. Code R307-103-3 (1) and in R307-103-2 (1) did file a Request for Agency Action, dated November 1, 2004. Sevier Citizens have sufficient facts to allow them Standing under R307-106-6 (3). to bring forth their request, R307-103-3(2). Furthermore, our request for standing should be granted under Utah Admin. Code R307-103-6(3).

As required under Utah Case law, Sevier Citizens has established standing by meeting the requirements of one or more of the three general rules for standing. Sevier Citizens will demonstrate a "distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute." Sevier Citizens "has a greater

interest in the outcome, " than any other participant in this action. Sevier Citizens will raise issues that will not be raised by other plaintiffs in this Action. Sevier Citizens will raise issues of great importance that ought to be decided in the furtherance of the public interest. In the interest of justice, Sevier Citizens must be granted standing as Sevier Citizens has met the requirements of Standing according to Utah law.

Sevier County Citizens meets the requirements of Utah Case law to be given the benefit of associational standing which permits the "legitimate claims by an entity with the capacity to spread the costs of litigation among its members and to assume the burdens incident to it rather than requiring a single litigant to carry the entire load." Utah Restaurant Assn v Davis County Board of Health.

Sevier County Citizens For Clean Air & Water meets the criteria to be granted association standing, (1) the individual members of the association have standing to sue; and (ii) the nature of the claim and the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause...

Sevier County Citizens For Clean Air & Water has submitted a Petition to Intervene and have Standing. Sevier Citizens has demonstrated that our interest in the environmental, ecological, financial, aesthetic, quality of life, and public health issues will be affected by the emissions and presence of the SPC proposed power plant.

Statement of Facts and Reasons

A. Statement of Fact

On April 1, 2003, Sevier Power Company submitted a Prevention of Significant Deterioration (PSD) permit application and its Notice of Intent (NOI) to construct and operate a 270 megawatt (MW) coal-fired power plant

near Sigurd, Utah. On September 10, 2003, Sevier Power Company submitted a revised PSD permit application and NOI.

The proposed Sevier Power Company facility requested emission limits hi[redacted] enough to be considered a "major" stationary source under Prevention of Significant Deterioration (PSD) regulations, and as such, was required to conduct the following analysis.

- Best Available Control Technology
- PSD Class I and II increment Consumption
- National Ambient Air Quality Standard analysis:
- Additional Impact Analysis

The area in which the proposed project is to be located is classified as an "attainment area". The proposed facility is required to meet the provisions of Utah Administrative Code including the requirements of a Notice of Intent and Approval Order established by Utah Admin. code R307-401.

The proposed facility is required to meet the provision of Utah's PSD regulation, Utah Admin. Code R307-405, in addition to code R307-201-1.

Since the proposed facility is an electric generating plant, it is subject to the New Source Performance Standards (NSPS) of 40CFR, part 60, subpart Da, which Utah has incorporated into state regulation at Admin. Code R307-210-1.

Sevier County Citizens has been involved throughout the permitting process. Sevier County Citizens spoke at the public hearing held on March 18, 2004, in Richfield. Comments were submitted within the designated comment period. Additional comments were submitted after the reopening of the comment period and before the close of that period.

On October 12, 2004, Richard W. Sprott, Executive Secretary of the Utah Air Quality Board, signed an AO authorizing construction and operation of the

proposed Sevier Power Company 270 MW circulating fluidized bed (CFB) coal-fired power plant. At the same time, UDAQ released a memorandum titled "Response to Comments received on Sevier Power Company," written by John Jenks, Environmental Engineer.

B. Statement of Fact

Sevier County Citizens for Clean Air & Water have standing to request Agency Standing.

Sevier County Citizens' members will suffer "distinct and palpable injury" to their interests as a result of UDAQ's AO for SPC's proposed power plant. Sevier Citizens interests will be damaged if the Presiding Officer does not dismiss the Executive Secretary's "motion to dismiss".

Sevier County Citizens seeks to insure total and complete compliance with the Utah Air Conservation Act and the Clean Air Act. (Title 19. Environmental Quality Code) Chapter 2 Air Conservation Act, 19-2-101(2). "It is the policy of this state and the purpose of this chapter to achieve and maintain levels of air quality which will protect human health and safety and to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the economic and social development of this state, and facilitate the enjoyment of the natural attractions of this state."

"(4) The purpose of this chapter is to:

(a) provide for a coordinated statewide program of air pollution prevention, abatement, and control"

"(c) facilitate cooperation across jurisdictional lines in dealing with problems of air pollution not confined within a single jurisdiction;"

"(d) provide a framework within which air quality may be protected and consideration given to the public interest at all levels of planning and development within the state."

Therefore, be it resolved, the Sevier County Citizens For Clean Air & Water has demonstrated that they have environmental, ecological, financial, aesthetic, quality of life, and public health issues that will be affected by the emissions and presence of the SPC proposed power plant.

Sevier County Citizens for Clean Air & Water has demonstrated sufficient cause for Standing. The affidavits and statements [attachment A] of James O. Kennon, Stanley D. Ivie, Dick Cumisky, Cindy Roberts, Calvin Johnson, Seth Hulls age 13, Kalecia Hulls age 12, Stephen Hulls, Victoria Bulostin, Jeannine Baker, and Sara Straw, provide evidence of injuries that are "distinct and palpable" caused by the issuance of SPC 's air quality permit.

Under conditions that currently exist, a number of our members must rema[redacted] anonymous, due to business ties, retribution by job loss, and or loss of benefits. Consequently our members participate at different levels of involvement. Some suffer from respiratory illnesses that will not allow active participation. A petition [attachment B] has been signed by 477 members of Sevier County Citizens For Clean Air & Water. These members signed the petition in protest of the AO of the SPC coal-fired power plant.

James O. Kennon is a member and President of the Sevier County Citizens For Clean Air & Water, living in Sevier County with his wife Carolyn. He has demonstrated that the quality of life, environmental, recreational, and health problems will have an adverse effect on him and his wife's very existence. James Kennon has demonstrated the ill effects of the pollution from the proposed power plant will impact the health of his wife and himself. "We both use oxygen tanks, with my wife using them approximately 20 hours out of each

24 hour day. I am being treated for COPD which makes it difficult to breathe with the present air quality."

An affidavit by Dick Cumisky states that he is a member of the Sevier County Citizens For Clean Air & Water and will suffer injuries by the UDAQ's authorizing of the construction and operation of the Sevier Power Company coal-fired power plant. The reason they moved to Sevier County was directly related to the pristine air found in the Sevier Valley. He and his wife visit Capitol Reef National Park on a regular basis and the construction of the SPC coal-fired plant would severely impact his enjoyment of this area. The collective impact of all coal-fired power plants on Class 1 purity requirements on National Parks would severely impact the enjoyment of these facilities.

Dick Cumisky questions whether the Sevier Valley is an attainment area when SPC, IPP, and Hunter Power Plant are factored in with the polluted air from the Wasatch Front.

Cindy Roberts, Sevier County Citizens for Clean Air & Water member and Vice President, is concerned about her physical and mental well being caused by the visibility impairment created by the SPC coal-fired power plant. The small particulate matter generated by the SPC plant would endanger her enjoyment of the outdoors for exercise and entertainment. Her quality of life would be marred as stated by Dr. Stephen Packam in a public meeting in Richfield. Selenium was not considered in the NOI. This element is known to kill alfalfa and other forage plants. Ms Roberts and her husband are working a 3rd generation family farm and expect to pass it on to the fourth generation. This is farmland that is the heart and center of their life. Their past, present, and future.

Jeannine Baker is bedridden and unable to give a deposition. She is in declining health and airborne pollutants are nearly impossible for her to metabolize.

Stephen Hulls writes his 12 yr old daughter has dealt with lung problems from birth. He and his wife have recently moved their entire family to Sevier

County. They moved here to escape the problems of pollution in the more populated big cities to find a cleaner more desirable air quality to raise his family in a more health friendly environment.

Kaleria Hulls, age 12, suffers from asthma that turns into pneumonia and she gets very sick.

Brother Seth Hulls, age 13, wrote a letter to County Commissioner Ralph Okerlund, expressing his views on the proposed power plant and asked that a copy of the letter be included with statements and affidavits of our members. He points out his concerns for their health and how people that have not suffered asthma attacks may not realize how bad it can be. Seth has concerns about fishing in the area waters and wants to maintain his quality of life.

Calvin Johnson of Monroe, Utah, describes how his wife was confined to bed for extended periods. She was found to have asthma. As the doctor that treated her suggested, they started looking for a place she could survive. They looked in three other states before finding Sevier County. The question is, what will happen when the clean air that they now enjoy, is taken from them.

In a statement dated February 8, 2005, Stanley Ivie, Professor, of Denton, Texas, writes the term "clean coal" is an insidious oxymoron. His family has deep roots in Sevier County. His grandfather pulled a handcart into the valley in 1880. He had a dream for the valley that was passed down to other family members. Mr. Ivie's dreams are not so different from his grandfather's. The Sevier Valley is his cathedral, and the sky is its vaulted ceiling. It is a national treasure surrounded by the Fishlake National Forest. Stan and his wife have spent the last two years working on construction of their dream home, and are looking forward to spending the rest of their lives in Sevier County.

Victoria Bulostin is a member and Director of Sevier County Citizens for Clean Air & Water and is concerned about the pollution from the SPC power plant. These concerns were stated by Dr. Packam at a public hearing in Richfield. "Even though scientists can't quantify any damage done by low

levels of pollutants expelled and emitted by the proposed power plants, there is a distinct possibility that the chemical releases would still affect people. The effect the chemicals could contribute to a pre existing condition or it could be that the visual effect of the pollution may have an emotional effect on people."

As an artist, mother, and human being, Sara Straw suggests that pollution is the crime of theft. The agencies are charged with protecting the commonwealth of all people, including posterity. A coal fired power plant will result in irreversible harm to our small mountain encircled valley. Sara is concerned that DAQ is not taking into consideration the cumulative consequences of the effects additional power plants. As an artist, she needs crystal clear atmosphere to pursue her craft. As with many, is questioning the financial loss due to the drop in property values.

Statement of Reasons

As stated below and in previous comments by Sevier County Citizens for Clean Air & Water, UDAQ's approval of Sevier Power Company PSD permit fails to comply with the Clean Air Act, the Utah Air Conservation Act, and the Utah Administrative Code.

The request for Agency Action is exemplified in the comments below.

1. UDAQ failed to evaluate the combined emissions of the three proposed coal-fired power plants currently under application in the state of Utah and the effects it would have upon the nearby National Parks.

The National Park Service, on November, 2003, submitted a notification to UDAQ stating that an analysis of Class1 air over Capitol Reef National Park showed a violation of the 3 hour average for SO_2 from

existing sources. On March 24, 2004, a formal letter was sent to UDAQ stating the same thing.

In the Notice of Intent to Approve: SPC 270 MW Coal-fired Power Plant dated February 27, 2004, Table II-8, page 32, and indicates the SO2 3-hour consumption of class I SIL to be 78.1%. Failure to also include the contribution of percent increases from both the proposed IPP expansion and the Hunter Plant expansion on this Class I area fail to meet the intent of the Utah Administrative Code R307-410-2 by failing to use the 3 hour average. While none of these plants, contributing individually may exceed the 3 hour average, all three combined likely exceed the limits.

Because the agency did not review the combined effects of the existing and proposed power plants together, the Sevier Power Company permit should be declared illegal, should be rescinded, and /or remanded to the agency for proper BACT analysis.

2. Should the petitioner wait until actual injury has occurred, which cannot precede the completion of the SPC project, there can be little redress beyond enforcing the emission limitations of this Approval Order. Therefore the protest must be addressed prior to issuance of the Approval Order.

First, recourse may only be obtained by proving "failure to monitor" any future violations of the Approval Order. There is no provision in the Approval Order, or in the Utah State statutes to rescind the Approval order once it has been issued. The only redress remaining is to seek compliance with the Approval Order.

It is certain that injury has not already occurred. However given if the evidence is speculative, there is every reason to challenge the additions of

pollutants to the air knowing full well that after construction is complete and the proposed plant is in operation, there is no recourse beyond enforcing the terms of the Approval Notice. The Approval order only regulates the emissions of the SPC project and does not account for where they are driven or trapped by the local air currents and terrain.

As home owners and permanent residents of Sevier County, Utah, we believe there will be little monitoring in the future. There has been no air quality monitoring in Sevier Valley which questions the integrity of the "baseline" air content. The Utah Clean Air Act requires that the state monitor and protect the air quality.

Therefore, the Sevier Power Company AO should be declared illegal, should be rescinded, and/or remanded to the agency for proper BACT analysis.

3. UDAQ failed to adequately consider the use of IGCC both as a viable method of achieving BACT and as a cost effective way to minimize emissions.

From the Utah State Implementation Plan, Section VIII, page 2 "Utah regulation require all new and modified sources in PSD areas to use the **Best Available Control Technology** (BACT) which would yield the highest air cleaning efficiencies and the lowest pollution discharges in an effort to save the air resource for future use and protect the national treasures such as our National Parks through planning designed to best benefit the state."

Section 1.7 of the "Intent to Approve" dated February 27, 2004 states "For the Sevier Power Company Project, IGCC was not chosen due to higher costs." This is not top down technology review. A thorough analysis must be undertaken. According to the US DOE, emissions of the regulated gasses and particulates for IGCC are less than ½ of those of CFB boilers.

Combustion experts question the selection of a dry "baghouse" for removal of the maximum percentage of exhaust pollutants and generally favor wet scrubbing for its superior removal characteristics. I can find no evidence of this method having been considered for the SPC project.

Therefore the Sevier Power Company AO should be declared illegal, should be rescinded, and/or remanded to the agency for proper BACT analysis.

4. UDAQ failed to determine that the ambient air within the Sevier Valley airshed is in compliance with the Clean Air Act and, in fact, has no base line data with which to evaluate the additions requested by SPC.

Paragraph 6.1.2 (Background Ambient Air Quality), SPC Notice of Intent, states that "Background concentrations of SO_2, NO_2, and CO were obtained from the UDAQ." I can find no record of UDAQ ever having compiled this data from on site studies, nor can it be found that relevant data was supplied from the National Weather Service (NWS). I can find no record of any monitoring sites located in Sevier County. EPA guidelines state that a three year study of ambient conditions is required. UDAQ has failed to prove that the area surrounding the proposed SPC plant is in compliance for listed air pollutants. There is no recorded data to either prove or disprove that certain conditions known to exist in Sevier Valley have been factored into the model.

Example one is agricultural dust: During the months of February through June, strong winds from the south are frequent in the valley. During this period of the year many fields are bare, tilling, or in a plowed condition. Clouds of dust (classified as PM_{10}) frequently last 6-8 hours, making the valley a non-attainment area for PM_{10} by anyone's observation. Intelligent observation makes this a reasonable conclusion without further scientific studies.

Example two is transportation: Sources from mobile emitters must also be considered. There are upwards of 500 diesel powered transporters registered and operated within Sevier County. Each heavy truck is driven many more miles in an average year than a car and emits significantly more pollutants. This significant mobile source must be considered when calculating the background concentrations.

Example three is imported pollution: During the winter months, when the wind is from the north, thick brown clouds of pollution are driven from the Wasatch front, past Nephi, and into Sevier Valley beginning at Gunnison. When the wind prevails from the north for more than six hours, the entire valley is often enveloped in these clouds reducing visibility to four miles or less.

EPA 40 CFR ch.1, section 9.2.1(b) states "typically, air quality data should be used to establish background concentrations in the vicinity of the source(s) under consideration. The monitoring network used for background determinations should conform to the same quality assurance and other requirements as those networks established for PSD purposes. An appropriate date validation procedure should be applied to the date prior to use."

Further, in section 11.2.2, it states the conditions under which various criteria should be selected and applied to the modeling process. When lack of sufficient monitoring data is available, 11.2.2(d) requires that the source

should obtain approval from the regional office (of EPA) for the monitoring network prior to the start of monitoring. We find no evidence of this having been done.

The NOI submitted by Sevier Power Company section II.1.3(f)22, page 24, states, "The meteorological data set used in the preliminary modeling analysis was derived from five years of hourly Sal Lake City NWS data." Now I ask you, what relevance does data collected 125 miles NW of the proposed site have to do with Sevier Valley – in a completely different air shed. SPC might as well have solicited data from Los Angeles International Airport.

Therefore, the Sevier Power Company AO should be declared illegal and should be rescinded.

5. UDAQ failed to model the air flows and currents as they actually exist within the enclosed Sevier Valley, but rather assumed uniform distribution of emissions from the proposed SPC plant.

UDAQ failed to require adequate collection of weather data by permitting SPC to utilize only one collection station within Sevier Valley. This one station is located approximately one half of the north-south distance where the valley is necked down similar to an hour glass. Figures 6.3-6.12 in the NOI show that nearly 92% of the recorded winds blow from either the SW quadrant or the NE quadrant which is the lineal direction of the valley. Calm winds average less than 1% of the recorded time.

CALPUFF modeling has the capability to forecast these possibilities, but only if the correct terrain and wind current data is first collected and

then input, and is combined with legitimate data on existing sources of pollution.

Wind velocities at both the ten and one hundred meter elevations from the tower placed by SPC indicate that nearly 100% of the emitted pollutants will disperse in only one direction at any one time, creating very high concentrations when they collide with the terrain limiting factors. The average height above the valley floor of the mountains surrounding the valley is 4500 feet. With a stack height of 462 feet, the SPC stack will only be 10% of the height of the mountains. We can find no evidence of this in the reports generated by wind and air current studies.

Emissions will concentrate either over Monroe, Joseph, or Sevier when the wind is from the north and over Salina, Aurora, Redmond, Gunnison, Manti, Ephraim, and Mt. Pleasant when the wind is from the south. These concentrated emissions will make the noted areas non-attainment areas much as happens in the Cache Valley and Ogden.

Therefore, the Sevier Power Company permit should be declared illegal, should be rescinded, and/or remanded to the agency for proper analysis.

6. Maximum predicted concentrations of PM10 in areas where the applicant has significant impact would occur along the eastern edge of the proposed site's property boundary, and is the result of coal handling processes at the plant.

The above statement from section II.1.5 (Results and Conclusions) of the NOI, paragraph 2, 9page 29) places the maximum PM10 precipitation within 0.75 mile of 74 homes and within 1.75 mile of 181 homes. This creates a significant health hazard for the residents of these homes, many occupying the house as the second and third generation resident.

For this reason alone, the Sevier Power Company permit should be declared illegal, should be rescinded, and/or remanded to the agency for proper analysis.

7. Fish Lake National Forest and Dixie National Forest are each in the process of implementing a "scheduled burn" program to improve the quality of the national forests. During the next ten years, each jurisdiction will potentially expel many tons of ash and pollutants into the local atmosphere which, by themselves, may potentially make Sevier Valley a non-attainment area. This potential is not noted in the NOI and is a major omission in modeling the airshed of Sevier Valley.

Draft impact statements are in process for upgrading the quality of these two national forests with final release scheduled for late in 2005. In addition to mechanical removal of undesired species, controlled and managed burns will take place to reduce the potential for catastrophic fires. Individual burns are not as yet enumerated and, naturally caused fires are unpredictable. Both will occur. Each incidence will likely make the air above Sevier Valley non-attainment. Provision must be made to accommodate the added pollution from these future fires.. The forests are already in place and must be managed for both productivity and diversity of use. The federal government has already authorized burning as a viable management tool and its use will be implemented in the near future – most likely prior to completion and operation of SPC project. There is no accommodation for this mandated burn and its subsequent addition to air pollution in the NOI.

Therefore, the Sevier Power Company permit should be declared illegal, should be rescinded, and /or remanded to the agency for proper analysis.

8. **The AO for SPC would permit the use of dry baghouse filters only for removal of the pollutants produced by the combustion operation. Many authorities site the superior value of water scrubbers for achieving MACT of these pollutants. I find no reference to the study of this process for inclusion in the NOI for SPC.**

In the Intent to Approve dated February 27, 2004, page 37 & 38, Selective Catalytic Reduction was evaluated against Selective Non-catalytic Reduction as a means of achieving Best Available Control Technology (BACT). Water scrubbing, a known control technology, was not evaluated. Many studies have pollutants from the combustion stream. Wet scrubbing, either with or without added catalysts, should have been evaluated for BACT.

Therefore, the Sevier Power Company permit should be declared illegal, should be rescinded, and/or remanded to the agency for proper analysis.

9. **UDAQ did not require sufficient analysis of the impacts of the Sevier Power Company coal-fired power plant on soil, vegetation, wildlife, and animals.**

Pursuant to Utah Admin. Code 307-405-6(2)(a)(i)(D), UDAQ must require a full and complete analysis of "the impairment to visibility, soils, and vegetation." The NOI makes reference to discussions with local

agencies but does not disclose what these discussions focused on. Much of the wildlife in the area depends on vegetation for food plots. Chuckers, sage grouse, and deer depend heavily on sagebrush and no analysis is found on this subject. To quote from the NOI, page 7-44, "Based upon this information it can be expected that some very long term negative impacts to lichens will occur, even at the low levels of the SO2 modeled for the proposed of the SPC project, though it is impossible to predict the magnitude of these impacts due to the ongoing and incomplete nature of the lichen research."

This alone should have raised a red flag. The last paragraph and the last line on page 7-44, it reads "Of these, alfalfa, wheat and barley, are considered to be SO2 sensitive, while corn is considered to be SO2 resistant."

And therefore, the Sevier Power Company AO should be declared illegal and should be rescinded.

10. **UDAQ illegally did not consider the impact on waterfowl and wildlife, Chap 19-2-101(2) of the Utah Air Conservation Act. This chapter requires that UDAQ "prevent injury to plant and animal life and property." The US Wildlife Service and Utah Div. of Wildlife were never contacted and no studies were undertaken. Migrating waterfowl and others, such as ducks, geese, cranes, and eagles, nest and feed in the area. The eagle's main food source in the winter is jackrabbit that frequents the area of the power plant. Not only did UDAQ ignore the studies on wildlife and animals, they ignored comments stated during the public comment period on this subject.**

Therefore, the Sevier Power Company AO should be declared illegal and should be rescinded.

11. UDAQ did not thoroughly analyze the impact of health issues citizens living in the shadow of the (SPC) power plant.

A study of health issues was not undertaken as required by the Utah Air Conservation Act and the Clean Air Act. Utah Conservation Act, 19-2-101(2) states, "It is the policy of this state and the purpose of this chapter to achieve and maintain levels of air quality which will protect human health and safety." Many people in Sevier County suffer from allergies and respiratory illness. Any degradation of the air quality will have an adverse effect on their illness and quality of life. An informal survey of a small section of Sigurd by one of our members came up with the following results. A total of 27 cases of asthma and emphysema were reported in an area that encompasses 1.75 miles from the proposed power plant. Another 9 people reported cardiovascular health problems and many are on oxygen to maintain them.

The Central Utah Health Center in Richfield, Utah, was contacted by the Sevier County Citizens for Clean Air & Water. The Health Center reported that they had never been contacted about the health issues and were not aware of their role in the process. A search of the Utah Health Centers indicated that no health studies have ever taken place in regard to coal-fired power plants and the health of the people living in the shadow of the plant.

The health effects on pregnant women and women of childbearing age were never considered. With homes within ½ mile of the proposed power plant with young families creates an unthinkable situation.

Therefore, the Sevier Power Company AO should be declared illegal and should be rescinded.

12. UDAQ failed to consider the financial impact of the property values, job loss, and additional medical expenses that the people of Sevier County will suffer from the AO of the Sevier Power Company permit.

UDAQ failed to consider the financial impact on Sevier County citizens due to lower property values and increased medical costs. Information obtained by Sevier County Citizens for Clean Air & Water shows a loss of job opportunities in both Millard and Emery counties, between pre power plant and post power plant years. In 1982, Millard County labor force was at 4082 employed civilian persons as recorded by Utah Dept. Of Workforce Services. In 2004, the employed civilians are 4307. When you subtract the 475 people working at IPP, you end up with a net loss of 250 jobs. This hardly can be considered to "promote the economic and social development" of this area. [Utah Air Conservation Act, chap. 19-2-101(2).

Emery County shows even more decline in employed persons. The dates of construction of their power plants are somewhat different, but the job loss is more dramatic. In 1980, 5553 employed were reported and in 2004, the employed persons are 3833. When the 395 jobs created by the power plants are deducted, you find 3438 employed persons for a net loss of 2115 employed persons from the 1980 total.

The expense of additional medical care was not considered in issuing the Approval Order for the Sevier Power Company Permit for a coal-fired power plant. The population around the power plant can expect increased medical expenses due to the added pollution from the proposed power plant. Life expectancy is on a steady increase with 77.6 yrs the latest figures available. The added costs of more frequent medical treatments justifies requiring the best technology be used to control pollution. (i.e. IGCC)

Therefore, the Sevier Power Company AO should be declared illegal and should be rescinded.

13. UDAQ did not consider the detrimental effects of the Sevier Power Company plant on the surrounding "natural attractions of this state." [Utah Air Conservation Act Chap. 19-2-101(2).]

Sevier County is the destination of people around the world to view the beauty of the area and nearby National Parks. The Sevier Power Company coal-fired power plant will harm the natural attractions of our valley. The Pahvant, the Kimberlys, Monroe, and Cove mountains will no longer have unobstructed views.

Therefore , the Sevier Power Company AO should be declared illegal and should be rescinded.

14. It has been stated that NEVCO (SPC) has agreed to cover the coal pile. If this is so, the "downwash" modeling needs to be reevaluated. If the "downwash" modeling is to

have any validity, the coal pile building must be included in the data in the NOI.

Therefore, the Sevier Power Company AO should be declared illegal and should be rescinded.

C. REQUEST FOR RELIEF

The Sevier County Citizens For Clean Air & Water requests that the Air Quality Board declare the Approval Order for the Sevier Power Company permit be declared illegal, and revoke the AO for the proposed coal fired power plant. The Sevier Citizens For Clean Air & Water have met the requirements to INTERVENE, and have Standing, and seek relief.

D. CONCLUSION

The Sevier County Citizens For Clean Air & Water have demonstrated sufficient facts to show that they will be adversely effected by the construction and presence of the SPC coal fired power plant near Sigurd, Utah. Sevier Citizens For Clean Air & Water have shown that in the "Interests and Justice", the Utah Air Quality Board should declare the Approval Order for the SPC project illegal and be rescinded.

The Sevier County Citizens For Clean Air & Water has demonstrated a personal stake by establishing

(1)The existence of an adverse impact on plaintiffs rights, (2) a causal relationship between the government actions that is challenged and the

adverse impact on the plaintiffs rights, and (3) the likelihood that the relief requested with redress the injury claim.

Sevier County Citizens For Clean Air & Water petition for Intervention should be granted because:

(1)The petitioner's legal interest may be substantially affected by the formal adjudicative proceeding,

(2)The interests of justice and orderly prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention. Utah code 63-46b-9(2) [cited by Utah administrative code R307-103-6(2)(a)]

Dated this 16th day of March, 2005

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Certification of Service

I hereby certify that on this 16th day of March, 2005, I caused a copy of the foregoing Request to the Presiding Officer to be mailed by United States Mail, postage paid, to the following:

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BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier Power Company 270 MW Coal-Fired Power Plant, Sevier County Project Code: N2529-001 DAQE-AN2529001-04	SPC ANSWER TO THE CITIZEN'S REQUEST FOR AGENCY ACTION

The Sevier Power Company (the "SPC") answers the **Request for Agency Action**, filed by the Sevier County Citizens for Clean Air and Water (the "SCC").

Introduction

On the 12 of October, 2004, Richard W. Spratt, Executive Secretary of the Utah Air Quality Board (the "Air Quality Board" or the "Board") signed the Approval Order (the "AO" or the "Permit") to authorize the construction and operation of the Sevier Power Company 270 MW Coal-Fired Power Plant in Sigurd, Utah. On November 1, 2004, the SCC filed its first **Request For Agency Action**. This document seemed to be more of a Petition for Standing rather than a Request for Agency Action. The Division of Air Quality (the "DAQ" or the "Division") objected to the lack of clarity in the document and then the SCC filed a second **Request for Agency Action** and the Division with drew its objection. The Board at its April, 2005 meeting, concluded that the SCC did have "standing" to request Agency action on the SPC permit. The updated **Request For Agency Action** was dated March 16, 2005.

SPC Answer to the November 1, 2004 Request for Agency Action

Since this document does not clearly state reasons for any Agency Action, the SPC denies each and every allegation contained in the SCC's November 1, 20004 **Request For Agency Action**.

SPC Answer to the March 16, 2005 Request for Agency Action

SPC generally asserts that the SCC has failed to present a claim that would justify the denial or any modification of its OA. SPC will also specifically answer each of the 14 allegations found in SCC March 16, 2005 **Request of Agency Action** as follows:

1. SCC: UDAQ failed to evaluate the combined emissions of the three proposed coal-fired power plants currently under application in the state of Utah and the effects it would have upon the nearby National Parks.

   SPC: The air modeling for the SPC plant was developed by the SPC metrological consultants, Meteorological Solutions Inc., and then it was submitted to the DAQ for their review and comment, then it was submitted to the US Forest Service for their review and comment, and then it was submitted to the US Park Service for their review and comment. Once the modeling plan met the requirements of the DAQ, the Forest Service and the Park Service, the actual modeling took place and then it was submitted as a part of the SPC application for the permit.

2. SCC: Should the petitioner wait until actual injury has occurred, which cannot precede the completion of the SPC project, there can be little redress beyond enforcing the emission limitation of this Approval order. Therefore the protest must be addressed prior to issuance of the Approval Order.

   SPC: The whole process of air quality regulation is designed to protect and prevent injury from clean air degradation. The National Ambient Air Quality Standards are health driven and are designed to protect the health and welfare of our citizens. The DAQ has issued a permit for the SPC which it believes complies with the requirements of both the Federal and State Clean Air Acts. The Board of Air Quality has determined that the SCC has standing to protest the award of the SPC AO and the Board of Air Quality is now in the process of reviewing the SPC OA to see if it should be approved, denied or approved with some modification.

3. SCC: UDAQ failed to adequately consider the use of IGCC both as a viable method of achieving BACT and as a cost effective way to minimize emissions.

   SPC: The SPC plant received its OA based on the use of a coal fired circulating fluidized bed boiler. This process met the ambient air quality standard and was approved as BACT for the plant. The IGCC process would require a much larger plant, 500 MW minimum, to be practical. SPC in its feasibility study stage examined this process and it found that was not practical, nor cost effective. The submitted circulating fluidized bed process meets all of the air quality standards.

4. SCC: UDAQ failed to determine that the ambient air within the Sevier Valley air shed is in compliance with the Clean Air Act and, in fact, has no base line data with which to evaluate the additions requested by SPC.

   SPC: The DAQ has the responsibility for each applicant to define the background air quality for each individual project. The DAQ determined the back ground air quality for SPC project. The back ground number that was selected was a 78 out of the 150 that was available for the project. This meant that over half of the increment available for the project was taken up by the back ground air quality.

This is a very conservative decision, designed to factor into the back ground, the agriculture dust, and imported pollution. The increment taken up the project was designed to account for the emissions from the trucks delivering the coal to the project. The DAQ has required that the modeling account for major existing point sources outside of the valley. These sources are included in the back ground criteria for the power plant. SPC complied with all of the stringent parameters developed by the DAQ for the SPC plant.

5. SCC: UDAQ failed to model the air flows and currents as they actually exist within the enclosed Sevier Valley, but rather assumed uniform distribution of emissions from the proposed SPC plant.

SPC: The air modeling for the SPC application was approved by the DAQ, the U.S. Forest Service and the U.S. Park Service. The CALPUFF modeling is a requirement of both the Forest Service and the Park Service. It is the technology currently being used by both the Park Service and the Forest Service to protect their resources.

6. SCC: Maximum predicted concentrations of PM10 in areas where the applicant has significant impact would occur along the eastern edge of the proposed site's property boundary, and is the result of coal handling processes at the plant.

SPC: The modeling requirements for the plant increment are designed to account for the PM 10 characteristics of each proposed project. With the PM 10 dust requirements as a part of the plan, the SPC application still meets the ambient air quality standards and was qualified to receive its OA.

7. SCC: Fish Lake National Forest and Dixie National Forest are each in the process of implementing a "scheduled burn" program to improve the quality of the national forests. During the next ten years, each jurisdiction will potentially expel many tons of ash and pollutants into the local atmosphere which, by themselves, may potentially make Sevier Valley a non-attainment area. This potential is not noted in the NOI and is a major omission in modeling the air shed of Sevier Valley.

SPC: Forest fires are not man made and are generally excluded from modeling requirements under the Federal Clean Air Act. Managed burns are strictly regulated and as a general rule, are not big pollution contributors. The high back ground number of 78 provides a conservative cushion that will allow a scheduled burn to be included and still not exceed the total ambient air quality standards.

8 SCC: The OA for SPC would permit the use of dry bag house filters only for removal of the pollutants produced by the combustion operation. Many authorities site the superior value of water scrubbers for achieving MACT of these pollutants. I find no reference in the study of this process for inclusion in the NOI for SPC.

SPC: A decision was made early in the feasibility process to utilize dry plant scrubbers and cooling towers, rather than wet scrubbers and cooling towers. This decision made it possible to run the plant on significantly less water than required for the wet process. The decision to reduce water usage at the plant reduces the big hit on local agriculture by conserving the amount of water needed for industrial purposes. Very little agriculture land will have to be converted to industrial uses to obtain the water necessary for a "dry" plant. While water conservation is a very worthy policy, the air quality will not suffer as a result of this decision. The plant will still meet with significant room to spare, the ambient air quality standards and is entitled to its OA.

9. SCC: UDAQ did not require sufficient analysis of the impacts of the Sevier Power Company coal-fired power plant on soil, vegetation, wildlife and animals.

SPC: There is an existing requirement that all permit applicants must comply with that deals the potential impairment to visibility, soils, and vegetation. This work is a part of the SPC application. The DAQ evaluated the information and found that SPC project would not impair in any significant way, these environmental requirement.

10. SCC: UDAQ illegally did not consider the impact on waterfowl and wildlife, Chap 19-2-101(2) of the Utah Air Conservation Act. This chapter requires that UDAQ "prevent injury to plant and animal life and property." The US Wildlife Service and Utah Div. of Wildlife were never contacted and no studies were undertaken. Migrating waterfowl and others, such as ducks, geese, cranes, and eagles, nest and feed in the area. The eagle's main food source in the winter is jackrabbit that frequents the area of the power plant. Not only did the UDAQ ignore the studies on wildlife and animals, they ignored comments stated during the public comment period on this subject.

SPC: Just because the DAQ granted the OA to the SPC does not mean that SCC comments were ignored. The application requirements for the OA require attention to the waterfowl and wildlife issues. See the answer to allegation #9 above. The plant has very little affect on any threatened or endangered species. SPC is entitled to a finding that it complies with the requirements for the protection of wildlife and waterfowl required for the OA.

11. SCC: UDAQ did not thoroughly analyze the impact of health issues citizens living in the shadow of the (SPC) power plant.

SPC: The whole process of industrial power plant permitting is to insure the citizens of a community that their health will be protected by the Federal and State regulation from the respective clean air acts. The compliance with the ambient air quality standards will protect the public health from the permitted emissions from the plant. These factors have already been built into the ambient

air qualtity standards so that it was not necessary to contact the Central Utah Health Center in Richfield, Utah.

12. SCC: UDAQ failed to consider the financial impact of the property values, job loss and additional medical expenses that the people of Sevier County will suffer from the AO of the Sevier Power Company permit.

SPC: The issues of economic welfare are not primary clean air issues for review by the DAQ when issuing a OA. However, the SPC will promote the economic and social development of the area. The SPC will be the largest single tax payer in Sevier County. It will provide 85 new jobs at the plant, not to speak about the construction crew that will range between 350 to 450 workers. It will be the largest construction project in the County. It will spin off additional jobs in the coal mining and trucking industries that already are the largest industries in the County. The examples from Millard and Emery Counties are taken out of context. The population of rural counties is in decline. If these industrial jobs were to be removed from their respective counties, the economies of Emery and Millard County would be devastated. It is interesting to note, that there was not a single protestant to the OA for the expansion of the IPA project in Millard County. Further the reference to greater medical costs because of the SPC plant is speculative in nature. This speculative alleged increased medical cost is a "red herring." The state of art, circulating fluidized bed boilers of the SPC plant will met all of the ambient clean air standards so that the health of the community will not be diminished because the SPC is granted its OA.

13. SCC: UDAQ did not consider the detrimental effects of the Sevier Power Company plant on the surrounding "natural attractions of this state."

SPC: As noted above, the modeling plan for the SPC plant was submitted, and then reviewed by the DAQ, The US Forest Service and the US National Park Service. Each of these entities reviewed the modeling and the standards for adequate protection for the surrounding attractions of this state. The SPC plant must meet these standards that look at concentration and levels of pollutants, visibility and deposition. These specific standards are built into the permit requirements to protect the surrounding attractions of this state. The OA was properly approved.

14. SCC: It has been stated that Nevco (SPC) has agreed to cover the coal pile. If this is so, the "down wash" modeling needs to be reevaluated. If the "downwash" modeling is to have any validity, the coal pile building must be included in the data in the NOI.

SPC: The submitted modeling plan was based on an uncovered coal pile, which is the strictest requirement. Covering the coal pile would significantly reduce PM 10 emissions, so when it was decided to cover the pile, remodeling was not required, because the plant already met the most stringent requirements. Even

though there is a very small "down wash" factor, the coal pile building was not considered a significant change to require a change in modeling, because the plant could still meet the more restrictive standards of the uncovered coal pile.

WHEREFORE, The SPC has answered each of the allegations raised by the SCC and hereby requests that the Air Quality Board affirm the OA issued by the Executive Secretary of the DAQ.

Dated this 10th day of June, 2005

/s/ FWF
Fred W. Finlinson
SPC Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2005, I caused a copy of the foregoing **SPC Answer To The Citizen's Request For Agency Action** to be mailed by United States Mail, postage prepaid, to the following:

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BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Sevier Power Company Power Plant Sevier County, Utah DAQE-AN2529001-04	EXECUTIVE SECRETARY'S RESPONSE TO THE REQUEST FOR AGENCY ACTION FILED BY THE SEVIER COUNTY CITIZENS FOR CLEAN AIR AND WATER

COMES NOW the Executive Secretary of the Utah Division of Air Quality (Executive Secretary), through undersigned counsel, and submits the following response to the Request for Agency Action filed by the Sevier County Citizens for Clean Air and Water in the above-captioned matter.

I. Introduction

On October 12, 2004, the Executive Secretary issued an Approval Order (AO) to Sevier Power Company (SPC) to construct and operate a coal-fired power plant in Sevier County, Utah. On November 1, 2005, Sevier County Citizens for Clean Air and Water (Sevier County Citizens or SCC) filed a Request for Agency Action appealing the SPC AO. In response to the Executive Secretary's filings on the issues of standing and intervention, Sevier County Citizens filed another document on March 16, 2005, that set forth further reasons for the group's challenge. While the latter document might be fairly characterized as an amended request for agency action, it is not so entitled, so the Executive Secretary will address the claims for relief set forth in both

documents. Unless otherwise specified, references herein to "request for agency action" shall refer to both documents collectively.

II. General Defenses

The Approval Order was issued on terms that are wholly appropriate and lawful. It is the result of much careful work by experienced and expert DAQ staff, taking into account submittals and input from SPC and its consultants, EPA and other experts, as well as timely consideration of comments by interested members of the public, government agencies, and other parties. The AO properly protects public health and the environment, while taking into account all factors required by applicable statutes and rules. All suggestions to the contrary by Sevier County Citizens' request for agency action are therefore denied.

III. SCC's Nov. 1, 2004 Request for Agency Action

These administrative proceedings began with SCC's filing of an untitled document dated November 1, 2004. Much of that document addressed the issues of standing and intervention, which are the subjects of a previous order of the Board. Other sections apparently attempted to set forth grounds for relief related to the Executive Secretary's issuance of the AO, although as the Executive Secretary noted in his initial response, sorting out the specific allegations related to each the various issues was difficult, given SCC's chosen language and organization of the document.

The Executive Secretary here responds to those specific allegations that appear, upon fair reading, to constitute SCC's reasons for its request for agency action. Any other reasons and factual assertions by SCC not specifically here addressed are denied. For ease of reference by the Board, the Executive Secretary will follow and repeat the numbering format set forth in SCC's document, including a restatement of each issue heading or summary.

1. The Sevier Power Company permit adversely impacts Sevier Citizens environmental and ecological Interests.

Executive Secretary's Response: This section makes several statements relating to ecological interests, including national parks and the general natural beauty of the Sevier Valley, as well as reference to families with respiratory illness, allergies and diabetes. No reference is made to AO terms that might have an impact on these issues, and this section therefore fails to state a claim upon which relief can be granted. The modeling demonstrated no violations of the National Ambient Air Quality Standards (NAAQS), increment, or Hazardous Air Pollutants (HAPs) standards. To the extent this section constitutes simply an attack on the possible existence of a coal-fired power plant in Sevier County and as relief seeks an order that the plant not be built, it likewise fails to state a claim upon which relief can be granted and asks for relief not within the authority of the Utah Air Quality Board. The allegations of this section are otherwise denied.

2. UDAQ authorization of the Sevier Power Company permit causes Sevier Citizens injury.

Executive Secretary's Response: This section appears to relate to SCC's initial request for intervention and statement of standing, but goes on to refer to UDAQ's alleged air monitoring obligations. No reference is made to AO terms that might have an impact on any listed issue, and this section therefore fails to state a claim upon which relief can be granted. The allegations of this section are otherwise denied.

3. The requested relief will redress Sevier Citizens injury.

Executive Secretary's Response: This section asserts that "the permit is the cause of injuries to Sevier Citizens," and seeks as relief the revocation of the AO. Sevier County Citizens Petition at 5. No reference is made to AO terms that might cause the alleged injuries, and this

section therefore fails to state a claim upon which relief can be granted. To the extent this section constitutes simply an attack on the possible existence of a coal-fired power plant in Sevier County and as relief seeks an order that the plant not be built, it likewise fails to state a claim upon which relief can be granted and asks for relief not within the authority of the Utah Air Quality Board. The allegations of this section are otherwise denied.

4. UDAQ's authorization of Sevier Power Company raises financial issues that need to be addressed.

Executive Secretary's Response: This section makes several statements relating to real estate values, structures and agricultural interests in Sevier County. No reference is made to AO terms that might have an impact on these issues, and this section therefore fails to state a claim upon which relief can be granted. To the extent this section constitutes simply an attack on the possible existence of a coal-fired power plant in Sevier County and as relief seeks an order that the plant not be built, it likewise fails to state a claim upon which relief can be granted and asks for relief not within the authority of the Utah Air Quality Board. The allegations of this section are otherwise denied.

IV. SCC's March 16, 2005 Request for Agency Action

In reply to the Executive Secretary's response to the initial request for agency action, SCC filed a document dated March 16, 2005. While that document further addressed the issues of standing and intervention, it also contained a subtitle or section named "Request for Agency Action," with several numbered sections setting forth reasons for SCC's requested relief. The Executive Secretary hereby responds to those specific allegations that are listed as SCC's reasons for its request for agency action. Any other reasons and factual assertions of SCC not specifically here addressed are denied. For ease of reference by the Board, the Executive

Secretary will follow and repeat the numbering format set forth in SCC's document, including a restatement of each issue heading or summary.

1. UDAQ failed to evaluate the combined emissions of the three proposed coal-fired power plants currently under application in the state of Utah and the effects it would have upon the nearby National Parks.

Executive Secretary's Response: The proposed source's owner, SPC, was required to include the potential impact of the IPP unit 3 proposal, and did so, but was not required to include other projects submitted later to UDAQ. Utah Admin. Code R307-405-6(2). The IPP plant was therefore included in an analysis, although the Hunter Unit 4 proposal was not, as the latter is not considered complete and review by UDAQ has been put on hold upon the applicant's request. To date, staff members have not identified any areas where the combined impacts of existing and future power plants would exceed an air quality standard.

The SPC project did not have a significant impact in any of the Class I areas. The Class I Significant Impact Level (SIL) was not exceeded, therefore no other sources need to be evaluated along with the SPC facility emissions for satisfying the Class I increment modeling requirements. The remaining allegations of this section are denied.

2. Should the petitioner wait until actual injury has occurred, which cannot precede the completion of the SPC project, there can be little redress beyond enforcing the emission limitations of this Approval Order. Therefore the protest must be addressed prior to issuance of the Approval Order.

Executive Secretary's Response: This section appears to address issues of standing and intervention, which are subjects of a previous order of the Board. The allegations of this section are otherwise so vague and confusing that the Executive Secretary cannot fairly determine the truth of the matters asserted, and are therefore denied.

3. UDAQ failed to adequately consider the use of IGCC both as a viable method of achieving BACT and as a cost effective way to minimize emissions.

Executive Secretary's Response: Consistent with applicable laws and regulations, UDAQ did not require consideration of Integrated Gasification Combined Cycle (IGCC) for the proposed SPC plant processes. Still, SPC provided an analysis, which UDAQ reviewed. IGCC is not yet proven as cost effective or available for the SPC plant processes and the BACT approved for the SPC facility is lawful and appropriate. The allegations of this section are otherwise so vague and confusing that the Executive Secretary cannot fairly determine the truth of the matters asserted, which are therefore denied.

4. UDAQ failed to determine that the ambient air within the Sevier Valley airshed is in compliance with the Clean Air Act and, in fact, has no base line data with which to evaluate the additions requested by SPC.

Executive Secretary's Response: SPC installed an ambient monitor for PM_{10} and a meteorological data collection tower. The data from this tower was combined with additional data from the National Weather Service and other sources when establishing inputs to the dispersion model. Based on data reviewed by UDAQ, the area is in attainment and complies with the Clean Air Act and the Utah Air Conservation Act.

The additional emission sources listed in this section of SCC's request were accounted for through various means consistent with EPA guidelines. Mobile sources were accounted for in the growth factors and background concentrations. Agricultural emissions were calculated in the background through use of the particulate monitor. Imported pollution was also accounted for in background concentrations, as well as by the cumulative analysis conducted by the source and reviewed by UDAQ. The Division followed EPA's Guideline to Air Quality Models and all PSD rules with respect to the requirements were included in the modeling analysis.

Regarding SCC's criticism of the use of Salt Lake City Airport data, the Executive Secretary notes that local meteorology data was used in certain portions of the modeling

analysis, whereas another area of the dispersion model required the use of upper air data – such as that obtained from the Salt Lake City Airport. Upper air data has little variability over a distance as short as 125 miles, and has more to do with long term seasonal changes than with local terrain effects. SCC's allegations in this section are therefore denied.

5. UDAQ failed to model the air flows and currents as they actually exist within the enclosed Sevier Valley, but rather assumed uniform distribution of emissions from the proposed SPC plant.

Executive Secretary's Response: Stating that the Division assumed uniform distribution of emissions, and yet also took into account the terrain-caused, local wind effects is contradictory. To the extent that the Executive Secretary understands this complaint to challenge the modeling methodology used in the AO, the Executive Secretary responds that SPC was required to obtain local meteorology data from the site where SPC proposed to locate. A 100-meter meteorological data collection tower was erected in the area of the proposed plant (approximately one mile away) so as to obtain wind data as would be experienced by actual emissions. The tower site location was reviewed and approved by the UDAQ meteorologist as being representative of weather conditions at the plant site.

Data from the collection tower was used in the model together with the local terrain through the use of topographic maps, distance calculations, and elevation numbers. To account for the terrain of the local valley, terrain modeling was used, rather than simple screen modeling. This use of local meteorology and local terrain characteristics properly accounted for the local terrain. The dispersion model used in the analysis for the Sevier Valley area is the EPA preferred model for simulating localized transport of pollutants, and all options chosen in the model for simulating pollutant transport, including effects on local terrain, followed EPA modeling guidelines. The selection of the best EPA-approved model available, and the data

necessary to drive the model demonstrate that the SPC near-field modeling analysis was top quality. Therefore, the modeling demonstrated that the various local areas would remain in attainment. SCC's allegations in this section are otherwise denied.

6. Maximum predicted concentrations of PM10 in areas where the applicant has significant impact would occur along the eastern edge of the proposed site's boundary, and is the result of coal handling processes at the plant.

Executive Secretary's Response: SCC has not articulated what it means by a "significant impact" or stated why it believes that any hypothetical impact is in violation of any federal, state, or local standard, or the relationship of such impact to the "coal handling processes at the plant." Sevier County Citizens Request for Agency Action at 15. Consistent with applicable laws and regulations, the modeling reveals that any impact is below the federal National Ambient Air Quality Standards (NAAQS), which are health-based standards. The highest predicted impact was less than the PSD Class II increment standard (as required by rule) which is only 20% of the federal health-based NAAQS. The allegations of this section are otherwise so vague, confusing, and conclusory that the Executive Secretary cannot fairly determine the truth of the matters asserted, which are therefore denied.

7. Fish Lake National Forest and Dixie National Forest are each in the process of implementing a 'scheduled burn' program to improve the quality of the national forests. During the next ten years, each jurisdiction will potentially expel many tons of ash and pollutants into the local atmosphere which, by themselves, may potentially make Sevier Valley a non-attainment area. This potential is not noted in the NOI and is a major omission in modeling the airshed of Sevier Valley.

Executive Secretary's Response: SPC was not required to include data from programs or sources that were not yet finalized or otherwise considered complete at the time of submission of its PSD application. SCC itself states that the burn programs are scheduled for final release in late 2005, potentially more than a year following the issuance of the SPC AO, and more than two years following the submission of the application (NOI).

Prior to issuing the Intent to Approve (ITA) for public comment, UDAQ sent the entire NOI to the United States Forest Service for a 60-day review period. The United States Forest Service (USFS) was also given opportunity to comment during both public comment periods. During that period, the USFS did not mention or address a scheduled burn program, nor express any concerns that such a program would affect or be affected by the SPC project. The USFS has neither stated nor shown that such a program would cause the Sevier Valley to become a non-attainment area. Additionally, the UDAQ has a smoke management program that permits prescribed burning with the goals of minimizing impacts and preventing violation of the NAAQS. SCC's allegations in this section are therefore denied.

8. The AO for SPC would permit the use of dry baghouse filters only for removal of the pollutants produced by the combustion operation. Many authorities cite the superior value of water scrubbers for achieving MACT of these pollutants. I find no reference to the study of this process for inclusion in the NOI for SPC.

Executive Secretary's Response: The allegations of this section are otherwise so vague and confusing that the Executive Secretary cannot fairly determine the truth of the matters asserted, and are therefore denied.

9. UDAQ did not require sufficient analysis of the impacts of the Sevier Power Company coal-fired power plant on soil, vegetation, wildlife, and animals.

Executive Secretary's Response: Consistent with applicable statutes and rules, all required studies were submitted to and reviewed by the UDAQ, and found to be adequately protective of soil, vegetation, wildlife, and animals. All allegations in this section are otherwise denied.

10. UDAQ illegally did not consider the impact on waterfowl and wildlife, Chap. 19-2-101(2) of the Utah Air Conservation Act. This chapter requires that UDAQ 'prevent injury to plant and animal life and property.' The U.S. Wildlife Service and Utah Div. Of Wildlife were never contacted and no studies were undertaken. Migrating waterfowl and others, such as ducks, geese, cranes, and eagles, nest and feed in the area. The eagle's main food source in the winter is jackrabbit that

frequents the area of the power plant. Not only did UDAQ ignore the studies on wildlife and animals, they ignored comments stated during the public comment period on this subject.

Executive Secretary's Response: Consistent with applicable statutes and rules, all required studies were submitted to and reviewed by the UDAQ, and found to be adequately protective of plant and animal life and property. All allegations in this section are otherwise denied.

11. UDAQ did not thoroughly analyze the impact of health issues citizens (sic) living in the shadow of the (SPC) power plant.

Executive Secretary's Response: The Executive Secretary has determined that the AO is adequately protective of human health, and has performed his responsibility consistent with the applicable statutes and rules. The allegations of this section are otherwise so vague and confusing that the Executive Secretary cannot fairly determine the truth of the matters asserted, and are therefore denied.

12. UDAQ failed to consider the financial impact of the property values, job loss, and additional medical expenses that the people of Sevier County will suffer from the AO of the Sevier Power Company permit.

Executive Secretary's Response: The Utah Department of Community and Economic Development supplied growth factors to UDAQ. These growth factors addressed related issues such as increases in truck traffic, impacts on labor force, and similar factors. SCC's conclusory allegations of impacts on the local labor force provide no context and are speculative. SCC has no explained how the SPC project would be responsible for the loss or gain in local labor force , but instead simply lists the total number of employed citizens in the area, without considering other factors.

The National Ambient Air Quality Standards are health-based standards and serve to protect public health. Similarly, the PSD increment values, which UDAQ included in the

modeling, exist to protect local air from degrading to the point where violations of these health-based standards occur. Because UDAQ's review properly considered the various impacts of which SCC complains, SCC's allegations in this section are denied.

13. UDAQ did not consider the detrimental effects of the Sevier Power Company plant on the surrounding 'natural attractions of this state. [Utah Air Conservation Act Chap. 19-2-101(2).]

Executive Secretary's Response: The Executive Secretary's review did not identify any threat to federal air quality standards or air quality related values, such as visibility, from the proposed project. Full details of the visibility and dispersion modeling analysis can be found in the New Source Plan Review, modeling memorandum, and Response to Comments prepared by UDAQ. Because the Executive Secretary properly considered the potential effects on the natural attractions of the state, SCC's allegations in this section are denied.

14. It has been stated that NEVCO (SPC) has agreed to cover the coal pile. If this is so, the 'downwash' modeling needs to be reevaluated. If the 'downwash' modeling is to have any validity, the coal pile building must be included in the data in the NOI.

Executive Secretary's Response: The downwash effect generally occurs when the height of the stack is less than 2.5 times the height of an attached building. The height of the proposed building used to house the coal pile is 35 feet. The proposed height of the main stack for the SPC facility is 460 feet, which is more than 15 times the height of the coal storage building. Furthermore, the stack and the storage building are in separate locations on the property. SCC's allegations in this section are therefore denied.

V. Affirmative Defenses

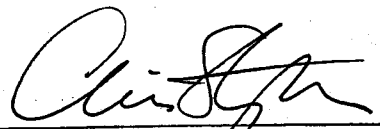
Sevier County Citizens for Clean Air and Water's Request for Agency Action fails to state a claim upon which relief can be granted.

VI. Request for Relief

The Executive Secretary respectfully requests that the Request for Agency Action be denied and that the Approval Order be upheld in its entirety.

DATED this 10th day of June, 2005.

MARK L. SHURTLEFF
Utah Attorney General



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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2005, I caused a copy of the foregoing to be mailed by United States Mail, postage prepaid, to the following:

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BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Sevier Power Company Power Plant Sevier County, Utah DAQE-AN2529001-04	EXECUTIVE SECRETARY'S REPLY TO SIERRA CLUB'S WITHDRAWAL FROM AMICUS STATUS

COMES NOW the Executive Secretary, through undersigned counsel, and submits the following Reply to Sierra Club's Letter declining to participate as Amicus in the above-encaptioned matter.

I. INTRODUCTION

On October 12, 2004, the Executive Secretary issued an Approval Order to Sevier Power Company (SPC) to construct and operate a coal-fired power plant in Sevier County, Utah. On November 12, 2004, Sierra Club and Grand Canyon Trust (collectively Sierra Club) filed a Request for Agency Action ("RAA") and a Petition to Intervene to appeal the Approval Order (AO). At an April 13, 2005 Air Quality Board meeting, SPC opposed the Sierra Club's standing to challenge the (AO). On May 12, 2005, the Board issued an order denying Sierra Club's Petition to Intervene, but granted Amicus status to Sierra Club.

Sierra Club appealed the Board's denial of the petition to the Utah Court of Appeals. Sierra Club also requested that the Board stay its denial of intervention, which was opposed by both SPC and the Executive Secretary. The Board denied the request for a stay in a June 6, 2005 order. Sierra Club subsequently requested a stay of the Board's order denying intervention before the Utah Court of Appeals, which was also denied in an order dated August 29, 2005.

The briefing of the issue of the Board's denial of intervention took placed as scheduled. On December 5, 2005, the Utah Court of Appeals transferred the issue of the denial of intervention to the Utah Supreme Court. Oral argument was held before the Utah Supreme Court on February 28, 2006. All parties now await a decision of the Court.

As the Board is aware, Sevier County Citizens for Clean Air and Water (SCC) was granted standing to pursue its own RFA, and the Board has scheduled a hearing on the merits of that RFA in May 2006. On March 13, 2006, Sierra Club sent a letter to the Board in which it declared that it did not wish to participate as Amicus in this matter, but renewed its request that the Board stay the hearing on SCC's RFA. For reasons outlined below, the Board should deny Sierra Club's request.

ARGUMENT

The Executive Secretary acknowledges Sierra Club's decision to withdraw from participation as amicus in this matter, and notes that the circumstances surrounding Sierra Club's participation in this case are no different now than they were when Sierra Club first requested a stay in 2005—no court has overturned the Board's decision denying standing to Sierra Club. Sierra Club's stated reason for its decision is that the organization does not believe that participation as amicus would permit Sierra Club to protect its interests. Sierra Club has also asserted that it is not in privity with SCC as to any of the issues or claims raised by SCC.

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BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Sevier Power Company Power Plant Sevier County, Utah DAQE-AN2529001-04	EXECUTIVE SECRETARY'S MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Rule 12(c) of the Utah Rules of Civil Procedure, the Executive Secretary of the Utah Air Quality Board ("Executive Secretary") submits this Motion for Judgment on the Pleadings pertaining to the Request for Agency Action filed by Sevier County Citizens for Clean Air and Water ("Sevier County Citizens" or "SCC").

This motion is supported by a memorandum in support filed with this motion and all other pleadings on file with the Board in this action.

Dated this 27th day of February, 2006.

MARK L. SHURTLEFF
Utah Attorney General

Paul M. McConkie, Assistant Attorney General
Christian C. Stephens, Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2006, I caused a copy of the foregoing to be mailed by United States Mail, postage prepaid, to the following:

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BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Sevier Power Company Power Plant Sevier County, Utah DAQE-AN2529001-04	EXECUTIVE SECRETARY'S MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Rule 12(c) of the Utah Rules of Civil Procedure, the Executive Secretary of the Utah Air Quality Board ("Executive Secretary") submits its Memorandum in Support of Motion for Judgment on the Pleadings pertaining to the Request for Agency Action filed by Sevier County Citizens for Clean Air and Water ("Sevier County Citizens" or "SCC"). At issue in this proceeding is whether the Executive Secretary conducted the proper regulatory review in issuing an Approval Order to Sevier Power Company to construct and operate a coal-fired power plant in Sevier County, Utah. This memorandum sets forth the claims on which the Executive Secretary is entitled to judgment on the pleadings.

I. INTRODUCTION

On October 12, 2004, the Executive Secretary issued an Approval Order to Sevier Power Company to construct and operate a coal-fired power plant in Sevier County, Utah. On November 1, 2005, Sevier County Citizens filed a Request for Agency Action ("RFA")

appealing the Approval Order. The status of this filing is the subject of a Motion to Dismiss, filed simultaneously with this motion. The Executive Secretary responded to the Request for Agency Action by requesting that the Board dismiss without prejudice Sevier County Citizens' RFA, due to numerous deficiencies in the RFA relating to standing and intervention, as well as deficiencies in its claims. As a result of the Executive Secretary's response, and before the Board took any action on the RFA, Sevier County Citizens filed another document on March 16, 2005, attempting to set forth more specific reasons for the group's challenge. The Executive Secretary did not challenge this second filing by Sevier County Citizens and represented at the Board meeting that he no longer opposed the intervention.[1] Consequently, the Board took no action on the Executive Secretary's motion to dismiss, and never determined the status of Sevier County Citizens' RFA dated October 12, 2004 ("first RFA")

The Executive Secretary anticipates that the Board will hold a hearing on the merits in May 2006. To ensure the proper scope of the hearing, the Executive Secretary renews its motion to dismiss with prejudice SCC's October 12, 2004 RFA (first RFA), as it has been superseded by its RFA dated March 16, 2005 RFA ("second RFA"). Consequently, the motion to dismiss and its supporting memorandum address the first RFA, while the motion for judgment on the pleadings and this supporting memorandum address only claims raised in the second RFA. The granting of both motions will properly limit the hearing to those issues raised with specificity, and further limit the hearing to claims over which the parties dispute the facts, thus conserving the Board's time and resources and permitting adjudication of the dispute in an efficient and fair manner. Accordingly, the Executive Secretary moves for judgment on the pleadings or dismissal on those claims from the second RFA, addressed below.

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[1] Transcript of April 13, 2005 Air Quality Board Meeting 41; Order Re: Petitions to Intervene, In the Matter of Sevier Power Company Power Plant.

REGULATORY BACKGROUND

I. The Clean Air Act

A. Purpose

Congress enacted the Clean Air Act "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1).[2] Also concerned with safeguarding the country's spectacular vistas, Congress "declare[d] as a national goal the prevention of any future, and the remedying of any existing, impairments of visibility in mandatory class I Federal areas which impairment results from manmade air pollution.[3]

The Clean Air Act is separated into several distinct programs. Those relevant to the SPC project include the National Ambient Air Quality Standards ("NAAQS") program, the Prevention of Significant Deterioration ("PSD") requirements of the New Source Review ("NSR") program, as well as New Source Performance Standards and Maximum Achievable Control Technology ("MACT") regulations. The Clean Air Act adopts a cooperative federalism approach to air pollution regulation whereby, with Environmental Protection Agency ("EPA") approval of a state implementation plan, the state is delegated authority to implement and enforce the Act. See 42 U.S.C. § 7410.

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[2] Congress saw as the reason for the broad regulatory scheme it put in place, "the growth in the amount and complexity of air pollution . . . [which] has resulting in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property . . . ." 42 U.S.C. § 7401(a)(2).

[3] Under the Clean Air Act and Utah Air Conservation Act, clean air areas (or attainment areas) are designated Class I, II, or Class III, which, in part, determines to what extent concentrations of criteria pollutants may be increased over background conditions. In Utah, the Class I areas are: Arches, Bryce Canyon, Canyonlands, Capitol Reef, and Zion National Parks. Utah Admin. Code R307-405-2(1). "[A]ll other areas of the State are designated as Class II" areas. Utah Admin. Code R307-405-2(2).

B. The National Ambient Air Quality Standards

Under the National Ambient Air Quality Standards ("NAAQS") program, EPA promulgated a list of "criteria" air pollutants whose presence in the atmosphere "may reasonably be anticipated to endanger public health and welfare." 42 U.S.C. § 7408(a)(1).

Two sections in the Clean Air Act govern the establishment, review, and revision of the NAAQS. Section 108 (42 U.S.C. 7408) directs the Administrator to identify certain pollutants which "may reasonably be anticipated to endanger public health or welfare" and to issue air quality criteria for them. These air quality criteria are to "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air."

Section 109 (42 U.S.C. 7409) directs the Administrator to propose and promulgate "primary" and "secondary" NAAQS for pollutants identified in Section 108.[4] These primary[5] and secondary[6] ambient air standards for nitrous oxides, particulate matter, sulfur oxides, carbon monoxide, lead, and ozone "accurately reflect the latest scientific knowledge" about the impact of these pollutants on the public health and welfare. 42 U.S.C. § 7408(a)(2).

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[4] Section 109(b)(1) defines a primary standard as one "the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria and allowing an adequate margin of safety, are requisite to protect the public health." Id. "A secondary standard as defined in section 109(b)(2) must "specify a level of air quality the attainment and maintenance of which . . . based on the criteria, [are] requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [the] pollutant in the ambient air." "Welfare effects as defined in section 302(h) (42 U.S.C. 7602(h)) include, but are not limited to, "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." Id.

[5] "[A]llowing an adequate margin of safety," national primary standards for criteria pollutants "are requisite to protect the public health." 42 U.S.C. § 7409(b)(1).

[6] Secondary standards for these air pollutants are "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. § 7409.

By definition, the NAAQS are set at levels that protect the health of the general population, including sensitive populations.[7]

C. The Prevention of Significant Deterioration Program

The PSD program, which comes under the NSR program, is intended to protect public health and welfare from any actual or potential adverse effect which in [EPA's] judgment may reasonably be anticipate[d] to occur from air pollution" and to ensure that "economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 4770(1). In addition, PSD requirements "preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments . . . and other areas of special national or regional natural, recreational, scenic, and historic value." 42 U.S.C. § 7470(2).

Under the NSR PSD requirements, in order to construct a new "major emitting facility," such as the SPC plant in an area attaining[8] the primary and secondary air quality standards, the project proponent must obtain a permit "setting forth emission limitations for such facility" prior to construction. 42 U.S.C. § 7475(a). Under the NSR PSD requirements, the facility must show that it will employ the "best available control technology" ("BACT") for each criteria pollutant emitted. 42 U.S.C. § 7475(a)(4); Utah

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[7] . . . the Committee emphasizes that included among those persons whose health should be protected by the ambient air standard are particularly sensitive citizens such as bronchial asthmatics and emphysematics who in the normal course of daily activity are exposed to the ambient environment. In establishing an ambient standard necessary to protect the health of these persons, reference would be made to a representative sample of persons comprising the sensitive group rather than to a single person in such a group. Ambient air quality is sufficient to protect the health of such person whenever there is an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups from exposure to ambient air. [Senate Committee on Public Works, Report No. 91-1196(1970), p 10)

CRS Report: 97-722 - Air Quality Standards: The Decisionmaking Process – NLE: Senate Report on the Clean Air Act Amendments of 1970;

[8] An attainment area is one in which the air "meets the national primary or secondary ambient air quality standard for a [criteria] pollutant." 42 U.S.C. § 7407(d)(1)(A)(i).

Admin. Code R307-401-6(1).[9] See Letter from Stephen D. Page, Director, attached as Exhibit A.

In addition, the applicant must demonstrate that the "facility will not cause, or contribute to, air pollution in excess of any . . . [NAAQS] in any air quality control region." 42 U.S.C. § 7475(a)(3); Utah Admin. Code R307-405-6(2). The application must further demonstrate that the facility will not cause or contribute to air pollution in excess of the maximum allowable increases of that pollutant or the PSD increment. R307-405-6(2)(a)(i)(A). The applicant must also provide an analysis of the air quality related impact of the source or modification including an analysis of the "impairment to visibility, soils, and vegetation [having significant commercial or recreational value] and the projected air quality impact from general commercial, residential, industrial, and other growth associated with the source or modification." Utah Admin. Code R307-405-6(2)(a)(i)(D).

The applicant must also conduct a Class I area impact analysis to prevent unacceptable impacts. Based on this analysis, the applicant must ensure that the project will not exceed the maximum allowable increases, or increments, of any area (Utah Admin. Code R307-405-6(2)(a)(i)(A)) and will not cause adverse impacts on visibility in Class I areas. Utah Admin. Code R307-406-2.

As part of the additional impact analysis, the Executive Secretary must provide written notification to the Federal Land Manager ("FLM") having jurisdiction over any mandatory Class I area of any proposed new major source or major modification that may reasonably be expected to affect visibility in that mandatory Class I areas and send the FLM a copy of all information

[9] The United States Environmental Protection Agency's Office of Air Quality, Planning, and Standards, has declared that "the EPA does not consider the BACT requirement as a means to redefine the basic design of a source or change the fundamental scope of the project when considering available control alternatives." December 13, 2005 letter from Stephen D. Page, Director, Office of Air Quality, Planning, and Standards, U.S. E.P.A.

relevant to the Notice of Intent and visibility impact analysis submitted by the source. As part of the NSR review, the Executive Secretary must then consider any analysis performed by the FLM and timely submitted that such proposed new major source may have an adverse impact on visibility in any mandatory Class I area. Utah Admin. Code R307-406-3(1).

Finally, as set forth in the 1990 amendments to the Clean Air Act, a PSD permit applicant must achieve MACT limitations to reduce the facility's emissions of hazardous air pollutants ("HAPs"). 42 U.S.C. § 7412(g)(2)(B).

STANDARD OF REVIEW

Where the governing statutes and rules so provide, the rules of civil procedure apply to administrative proceedings. Pilcher v. Dept. of Social Services, 663 P.2d 450, 453 (Utah 1983). The Utah Rules of Civil Procedure allow a defendant to file a Motion for Judgment on the Pleadings pursuant to Rule 12(c) as follows:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56,and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Utah R. Civ. P. 12(c).

It is hornbook law that Rule 12(c)

> Is designed to provide a means of disposing of cases when the material facts are not in dispute between the parties and a judgment on the merits can be achieved by focusing on the content of the competing pleadings, whatever is central or integral to the claim for relief or defense, and any facts of which the district court will take judicial notice.

5C Wright & Miller, Federal Practice and Procedure § 1367 (2005).

As stated in the rule, a party may move for judgment on the pleadings "[a]fter the

pleadings are closed,"[10] and a Rule 12(c) motion will be governed by the same standard as a Rule 12(b)(6) motion to dismiss. *See* Utah R. Civ. P. 12(c); Seolas v. Bilzerian, 951 F. Supp. 978, 980 (D. Utah 1997). Therefore, the moving party must "clearly establish that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." 5C Wright & Miller, Federal Practice and Procedure § 1368 (2005). Finally, "the motion for judgment on the pleadings admits all 'well pleaded facts, as well as those facts accepted through 'judicial notice' or 'official notice.'" Id.[11]

The Board has a two-fold responsibility at a hearing on the merits: (1) to determine the facts; and (2) to apply the law to those facts. The Board then takes those findings of fact and conclusions of law and reaches a decision that it would finalize in an order. To streamline the process, judgment on the pleadings is a procedural device that allows the Board to resolve claims "when moving party is entitled to judgment on the face of the pleadings themselves." Mountain America Credit Union v. McClellan, 854 P.2d 590, 591 (Utah Ct. App. 1993). Judgment on the pleadings is appropriate when neither party disputes the material facts underlying their dispute. Town of Mapleton v. Kelly, 17 P. 52 (Utah 1911) (stating that presence of material facts prevents entry of judgment on the pleadings). "A 'material fact' is one which affects the rights or liabilities of the parties." Holland v. Iron Mining Co., 293 P.2d 700, 709 (Utah 1956). In

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[10] "Pleadings" for the purposes of this case means the RFA and responses to the RFA. See Utah R. Civ. P 7(a) (defining pleadings as the complaint, answer and cross and third-party claims.)

[11] The Board may take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence, of the record of other proceedings before the agency, and of technical or scientific facts within the agency's special knowledge." Utah Code Ann. § 63-46b-8(1)(b)(iv); *see also* Hansen v. Mr. D's Food Ctr., 827 P.2d 371, 374 (Wyo. 1992)("an administrative agency may take judicial notice of materials contained in their files. . ."). Pursuant to the statute, administrative agencies can also take "official notice" which is "the administrative law device for entering into the record information which has not been proved through the hearing methods. Official notice involves a method for getting information into the record somewhere between proof and simple recognition of a fact as so well accepted as to be beyond debate." 2 Charles H. Koch, Jr., Administrative Law and Practice § 5,55 (2d ed. 2005). "Official notice is a broader concept than judicial notice. Both doctrines allow adjudicators to take notice of commonly acknowledged facts, but official notice also allows an administrative agency to take notice of technical or scientific facts that are within the agency's area of expertise." Zubeda v. Ashcroft, 333 F.3d 463, 479 (3d Cir. 2003)(explaining the difference between official and judicial notice).

other words, an issue of material fact is one that must be determined by a fact finder (in this case, the Board) because the parties do not agree on the basic factual circumstances that have resulted in their dispute.

Conversely, no issue of material fact exists when the parties agree as to the facts. Thus, when the parties do not dispute the factual basis of a claim, the Board's only remaining task is to apply the law and reach a judgment, eliminating the time and expense of an unnecessary hearing on that claim. If the Board determines that material facts remain on some claims, those claims continue on for formal adjudication at a hearing on the merits.

Now that discovery has concluded it is apparent that certain claims contain no issue of material fact, or fail to state a claim at all. As a result, the Board's only remaining responsibility on those claims is to apply the law and reach a decision. As the Executive Secretary shows below, the undisputed nature of the facts renders a hearing unnecessary on those claims, and saves the time and expense of adjudication. If the Board grants this motion, the May 2006 hearing will be limited to claims raised in Sevier County Citizens' second RFA where a factual dispute remains to be resolved.

STATEMENT OF UNDISPUTED FACTS

1. On September 10, 2003, NEVCO Energy Co. LLC, a parent company of Sevier Power Company (hereinafter "SPC") submitted a Notice of Intent ("NOI") to the Utah Division of Air Quality ("UDAQ") to propose construction and operation of a coal-fired steam electric generating facility to be located near Sigurd in Sevier County, Utah, known as the Sevier Power Company project ("SPC project").

2. Sevier County is an attainment area of the National Ambient Air Quality Standards ("NAAQS") for all pollutants.

3. The proposed Sevier Power Company facility requested emission limits high enough to be considered a "major" stationary source under Prevention of Significant Deterioration ("PSD") regulations, and as such, was required to conduct an analysis that included:

- Best Available Control Technology (BACT)[12]
- PSD Class I and II increment consumption[13]
- National Ambient Air Quality Standard analysis
- Additional Impact Analysis

4. The proposed SPC plant was subject to the New Source Review ("NSR") and PSD requirements and as such, SPC was required to obtain a permit setting forth emission limitations for such facility prior to construction.

5. The proposed facility is required to meet the provisions of Utah's PSD regulations, Utah Admin. Code R307-405, in addition to R307-201-1.

6. Since the proposed facility is an electric generating plant, it is subject to the New Source Performance Standards (NSPS) of 40 C.F.R., part 60, subpart Da, which Utah has incorporated into state regulation at Utah Admin. Code R307-210-1.

7. A public comment period was held in accordance with Utah Admin. Code R307-401-4 and comments were received.

8. Sevier County Citizens has been involved throughout the permitting process. Sevier County Citizens spoke at the public hearing held on March 18, 2004, in Richfield. Sevier Count Citizens also submitted comments during the designated comment period. Additional

[12] 42 U.S.C. § 7475(a)(4); Utah Admin. Code R307-401-6(1)
[13] 42 U.S.C. § 7475(a)(3); Utah Admin. Code R307-405-6(2)

comments were submitted after the reopening of the comment period and before the close of that period.

9. On October 12, 2004, Richard W. Sprott, Executive Secretary of the Utah Air Quality Board, signed an Approval Order authorizing construction and operation of the proposed Sevier Power Company 270 mega-watt circulating fluidized bed (CFB) coal-fired power plant.

ARGUMENT

The Board is being asked to judge whether the Executive Secretary properly applied the rules in his issuance of the Approval Order. The rules being implemented by the Executive Secretary are those rules made by the Board in accordance with Title 63, Chapter 46a, (Utah Administrative Rulemaking Act) "implementing an operating permit program as required by and in conformity with Titles IV and V of the federal Clean Air Act Amendments of 1990." Utah Code Ann. § 19-2-104(1)(f). As the Board is aware, in making rules for the purpose of administering a program under the federal Clean Air Act, the Board may not make rules "more stringent than the corresponding federal regulations which address the same circumstances." Utah Code Ann. § 19-2-106(1). The only exception would be where there has been a "written finding after public comment and hearing and based on evidence in the record, that corresponding federal regulations are not adequate to protect public health and the environment of the state." Utah Code Ann. § 19-2-106(2). Such is not the case here. This is not a rule making hearing. The rules are already in place. Likewise, it would be improper for the Executive Secretary to add upon the regulatory requirements. The only issue before the Board is whether its rules were properly implemented by the Executive Secretary.

Furthermore, the desirability of building a coal-burning power plant in Sevier County as opposed to dealing with energy issues in other ways are issues and policies debated and made by elected public officials on capitol hill and is not an appropriate issue in this proceeding.

The Executive Secretary addresses the relevant claims below, following the order in which the claims appeared in Sevier County Citizen's March 16, 2005 RFA:

> **SCC Claim 1: UDAQ failed to evaluate the combined emissions of the three proposed coal-fired power plants currently under application in the state of Utah and the effects it would have upon the nearby National Parks.**

SCC's contention that UDAQ was required to evaluate emissions from "proposed coal-fired power plants currently under application" is without merit as a matter of law. Utah Admin. Code R307-405-6(2) requires that "[e]very new major source . . . must be reviewed by the Executive Secretary to determine the air quality impact of the source to include a determination whether the source will cause or contribute to a violation of the maximum allowable increases or the NAAQS in any area" as of "the source's projected start-up date." The Executive Secretary's review "shall take into account all allowable emissions of ***approved*** sources or modifications whether constructed or not, and, to the extent practicable, the cumulative effect on air quality of all sources and growth in the affected area." Id. (emphasis added).

To comply with this requirement, SPC included those sources required by R307-405-6(2). However, the determination did not include other projects submitted later to UDAQ, because by definition such sources are not "approved sources." Utah Admin. Code R307-405-6(2). For instance, the Executive Secretary's determination did not include the Hunter Unit 4 proposal because it was not considered complete and because UDAQ review had been put on hold upon the applicant's request.

Because the parties agree as to the factual basis for this claim, and because the Executive Secretary has demonstrated that his actions complied with the law, the Executive Secretary is entitled to judgment as a matter of law on this claim.

SCC Claim 2: Should the petitioner wait until actual injury has occurred, which cannot precede the completion of the SPC project, there can be little redress beyond enforcing the emission limitations of this Approval Order. Therefore the protest must be addressed prior to issuance of the Approval Order.

This claim appears to take issue not with the Executive Secretary's actions as much as with the administrative appeal process. To the extent that this claim addresses injury in the context of standing and intervention, the Executive Secretary responds that the Board addressed the questions of injury and standing in a previous order.[14] Since the Board granted standing to SCC and since SCC is currently exercising its opportunity to challenge the permit, the claim is moot and should be dismissed as a matter of law.

SCC Claim 3: UDAQ failed to adequately consider the use of IGCC both as a viable method of achieving BACT and as a cost effective way to minimize emissions.

This claim likewise presents only a question as to what the law requires. Under the NSR PSD requirements, the facility must show that it will employ the "best available control technology" ("BACT")[15] for each criteria pollutant emitted. 42 U.S.C. § 7475(a)(4); Utah Admin. Code R307-401-6(1).

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[14] Order Re: Petitions to Intervene, In the Matter of Sevier Power Company Power Plant.

[15] Utah Code Ann. R307-101-2(4) defines Best Available Control Technology (BACT) as:

> an emission limitation and/or other controls to include design, equipment, work practice, operation standard or combination thereof, based on the maximum degree or reduction of each pollutant subject to regulation under the Clean Air Act and/or the Utah Air Conservation Act emitted from or which results from any emitting installation, which the Air Quality Board, on a case-by-case basis taking into account energy, environmental and economic impacts and other costs, determines is achievable for such installation through application of production processes and available methods, systems and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall applications of BACT result in emissions of any pollutants which will exceed the emissions allowed by Section 111 or 112 of the Clean Air Act.

A complete top-down BACT review[16] was completed and submitted as part of the NOI. In his BACT review, the Executive Secretary did not require consideration of IGCC[17] because IGCC is a separate process and not a control technology. Utah follows the interpretation of the EPA, which has recently reaffirmed its policy that IGCC technology need not be considered under a Clean Air Act BACT analysis for proposed pulverized coal electricity generating facilities.[18] The EPA reasoned that IGCC technology would redefine the proposed project, which Congress did not intend to require in a BACT analysis under the PSD permitting program.[19] The Executive Secretary's review was consistent with the regulation's plain language, agency practice, and EPA policy. Since this claim contains no genuine issue of material fact the Executive Secretary is entitled judgment as a matter of law.

SCC Claim 6: Maximum predicted concentrations of PM_{10} in areas where the applicant has significant impact would occur along the eastern edge of the proposed site's boundary, and is the result of coal handling processes at the plant.

The basis for SCC's contention is not clear as there is no claim as to how the AO fails to satisfy the law. To the extent that SCC claims that the AO, as permitted, poses a health hazard to

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This definition is modeled after and nearly identical to the BACT definition codified at 40 C.F.R. § 52.21(j) in the Code of Federal Regulations.

[16] The top-down process provides that all available control technologies be ranked in descending order of control effectiveness. The PSD applicant first examines the most stringent—or "top"—alternative. That alternative is established as BACT unless the applicant demonstrates, and the permitting authority in its informed judgment agrees, that technical considerations, or energy, environmental, or economic impacts justify a conclusion that the most stringent technology is not "achievable" in that case. If the most stringent technology is eliminated in this fashion, then the next most stringent alternative is considered, and so on. EPA New Source Review Workshop Manual, Draft October 1990.

[17] The applicant provided an analysis of IGCC, which the Executive Secretary reviewed, but this action was voluntary and was not a regulatory requirement.

[18] December 13, 2005 letter from Stephen D. Page, Director, Office of Air Quality, Planning, and Standards, U.S. E.P.A., attached as Exhibit A.

[19] Id.

SCC's members, SCC fails to state a claim as to how the AO fails to satisfy the law. SCC fails to define "significant impact" or state why it believes that any hypothetical impact is in violation of any federal, state, or local standard, or the relationship of such impact to the "coal handling processes at the plant." SCC RFA at 15. The modeling shows that any impact is below the federal National Ambient Air Quality Standards (NAAQS) and that the highest predicted impact was less than the PSD Class II increment standard (as required by rule) which is only 20% of the federal health-based NAAQS.

Because SCC makes no claim as to any disputed fact or to any law that was violated, the Executive Secretary is entitled to judgment as a matter of law on this claim.

> **SCC Claim 7: Fish Lake National Forest and Dixie National Forest are each in the process of implementing a 'scheduled burn' program to improve the quality of the national forests. During the next ten years, each jurisdiction will potentially expel many tons of ash and pollutants into the local atmosphere which, by themselves, may potentially make Sevier Valley a non-attainment area. This potential is not noted in the NOI and is a major omission in modeling the airshed of Sevier Valley.**

Utah Admin. Code R307-405-6(2) states that approved major sources must be included in the Executive Secretary's review of a PSD permit application. This major source review includes all allowable emissions of approved sources or modifications and the cumulative effect on air quality of all sources and growth in the affected area. Id. Utah Admin. Code R307-101-2 defines a source as "any structure, building, facility, or installation which emits or may emit any air pollutant . . . ." This definition does not include temporary sources such as prescribed burns in national forests. Utah Admin. Code R307-204 accounts for scheduled burn emissions through a smoke management program, and emissions from such burns are evaluated as part of a wildland fire implementation plan. The plan is used to meet an annual emissions goal which is included in the State inventory and is included as part of the calculations in determining the

background concentrations used as part of the modeling for PSD permits. Utah Admin. Code R307-204-4(4).

As part of the Additional Impact Analysis required by Utah Admin. Code R307-406-2(3), the Executive Secretary took appropriate steps to ensure full coordination with the relevant governmental agencies. Utah law requires that the Executive Secretary notify the various federal land management agencies with jurisdiction over public lands that will be affected by the proposed facility, as shown by the modeling results. Pursuant to Utah Admin. Code R307-401-4(1), the National Park Service, the Forest Service, and the Bureau of Land Management were the pertinent Federal Land Managers (FLMs), and all were given ample time to review the study and any impact on air quality-related values. None of the FLMs raised any such issues or concerns.

The Forest Service in particular had a 60-day review period to comment prior to both public comment periods. As noted above, at no time during any of those periods did USFS mention or address a scheduled burn program,[20] nor express any concerns that such a program would affect or be affected by the SPC project. Additionally, the smoke management program explained above permits prescribed burning with the goal of minimizing impacts and preventing violation of the NAAQS. Pursuant to Utah Admin. Code R307-204-4(1), any future scheduled burn by the Forest Service must comply with that smoke management program.

The Executive Secretary followed the proper procedures in his review of the SPC permit, and does not deny that he did not consider the scheduled burn program in his review, because consideration of a draft burn plan was not required. Accordingly, this claim presents no genuine issues of material fact, and the Executive Secretary is entitled to judgment as a matter of law.

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[20] The scheduled burn programs referred to in SCC's claim were in the drafting stage and not even finalized at the time of SPC's submission of it s PSD application.

SCC Claim 10: UDAQ illegally did not consider the impact on waterfowl and wildlife, Chap. 19-2-101(2) of the Utah Air Conservation Act. This chapter requires that UDAQ 'prevent injury to plant and animal life and property.' The U.S. Wildlife Service and Utah Div. Of Wildlife were never contacted and no studies were undertaken. Migrating waterfowl and others, such as ducks, geese, cranes, and eagles, nest and feed in the area. The eagle's main food source in the winter is jackrabbit that frequents the area of the power plant. Not only did UDAQ ignore the studies on wildlife and animals, they ignored comments stated during the public comment period on this subject.

SCC's contention that the UDAQ did not consider the impact upon waterfowl and wildlife from the potential emissions from the proposed facilities ignores the purpose of the NAAQS requirements. Although analysis of impacts on wildlife and animals is not specifically required under the Clean Air Act or the Air Conservation Act, the secondary NAAQS do provide protection of wildlife and animals. The impact analysis demonstrated that impacts were within the secondary NAAQS for PM_{10}, NO_2, and SO_2. These secondary standards set limits to protect public welfare, including protection against decreased visibility, as well as to prevent damage to animals, crops, vegetation, and buildings.

Moreover, section 302(h) of the Clean Air Act clearly states that the secondary NAAQS for pollutants are designed to protect animals and wildlife. "Welfare effects as defined in section 302(h) (42 U.S.C. §7602(h) include, but are not limited to, "effects on soils, water, crops, vegetation, manmade material, **animals, wildlife**, . . . as well as effects on economic values and on personal comfort and well-being" (emphasis added).

The state rule in question is R307-405-6(2)(a)(i)(D). The pertinent text states that the major source applicant must provide "[a]n analysis of the air quality related impact of the source or modification including an analysis of the impairment to visibility, soils, and vegetation and the projected air quality impact from general commercial, residential, industrial, and other growth associated with the source or modification." To support its claim, SCC apparently relies only on

the preamble and statement of policy in the initial section of the Utah Air Conservation Act. U.C.A. § 19-2-101(2). This general statement reflects legislative philosophy and goals, and is consistent with the purpose of the NAAQS as set forth in the federal Clean Air Act. However, as the Utah Supreme Court has made clear, this general statement cannot be used as an independent operative provision of the statute.[21]

As part of the Additional Impact Analysis in compliance with Utah Admin. Code R307-406-2(3) appropriate steps were taken by the Executive Secretary to ensure full coordination with the Federal Land Managers (FLMs). Prior to issuing the Intent to Approve (ITA) for public comment, the Executive Secretary sent the entire NOI to the National Park Service, the Forest Service, and the Bureau of Land Management for a 60-day review period. Said Federal Land Managers also had an opportunity to comment during both public comment periods. The Executive Secretary relies upon these FLMs to raise concerns about potential impacts on wildlife and animals. The FLMs have their own federal rules and regulations which they can enforce.

Additionally, Utah Admin. Code R307-410 requires an emissions impact analysis, which is a screening analysis for Hazardous Air Pollutants (HAPS). The UDAQ toxicologist reviews any HAPS issues that are not addressed by the screening analysis. Although the applicable law does not contain a separate requirement for wildlife study, Appendix W, Part 9.2 of 40 C.F.R. § 51.166 addressed background concentrations, which account for effects on vegetation and wildlife.

Based on the foregoing, this claim presents no issue of material fact and the Executive Secretary is entitled to judgment as a matter of law.

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[21] "While some statutes have a policy section and some have a preamble, the effect to be given these provisions is the same: they provide guidance to the reader as to how the act should be enforced and interpreted, but they are not a substantive part of the statute." Price Development Co. v. Orem City, 995 P.2d 1237, 1246 (Utah 2000).

SCC Claim 11: UDAQ did not thoroughly analyze the impact of health issues on citizens (sic) living in the shadow of the (SPC) power plant.

In contending that the Executive Secretary did not "thoroughly" analyze the impact of health issues on local residents, SCC disregards the federal and state regulatory requirements as being not thorough enough. SCC again apparently relies on the general language of the preamble to create requirements beyond those set forth in the state and federal rules and regulations. Sevier County Citizens attached to its Request for Agency Action a number of affidavits of local residents with various health issues stating how each believes his or her health would be detrimentally impacted by emissions from the SPC plant. SCC apparently intends to have 20 or 30 of these individuals testify at the hearing on that issue. Because by definition the NAAQS are health-based standards set at levels that protect the health of the population, including sensitive populations, and because health is the sole criteria for setting the primary NAAQS,[22] the regulations do not require or envision additional health impact studies of individual residents, on a case by case basis.

Moreover, the modeling did not identify any threat to federal air quality standards or air quality related values from the proposed project. The regulations require NAAQS and increment analyses, which SPC submitted and the Executive Secretary reviewed. Utah Admin. Code R307-410 requires an emissions impact analysis, which is a screening analysis for Hazardous Air Pollutants (HAPS). The UDAQ toxicologist reviews any HAPS issues that are not addressed by the screening analysis.

Accordingly, this claim presents no factual issue and the Executive Secretary is entitled to judgment on this issue as a matter of law.

[22] CRS Report: 97-722 - Air Quality Standards: The Decisionmaking Process - NLE

SCC Claim 12. UDAQ failed to consider the financial impact of the property values, job loss, and additional medical expenses that the people of Sevier County will suffer from the AO of the Sevier Power Company permit.

To the extent that Sevier County Citizens may rely on Utah Admin. Code R307-405-6(2)(a)(i)(D) as the basis for this claim, this allegation fails to state a claim. R307-405-6(2)(a)(i)(D) requires "[a]n analysis of the of the air quality related impact of the source . . . including an analysis of the impairment to visibility, soils, and vegetations **and the projected air quality impact** from general commercial, residential, industrial, and other growth associated with the source or modification" (emphasis added). There is no rule requiring consideration of the potential impacts alleged in Claim 12.

Once again, SCC seeks to hold the Executive Secretary to standards beyond those required by state and federal regulations. Other than its generic reference to the preamble of the Air Conservation Act, SCC has failed to allege how any action by the Executive Secretary did not comply with the law, this claim presents no factual issue and the Executive Secretary is entitled to judgment as a matter of law.

SCC Claim 13. UDAQ did not consider the detrimental effects of the Sevier Power Company plant on the surrounding 'natural attractions of this state. [Utah Air Conservation Act Chap. 19-2-101(2).]

As in Claim 12, the applicable rule is R307-405-6(2)(a)(i)(D). Potential impacts to "surrounding natural attractions" were included in the Class I area impacts analysis. The Executive Secretary's review did not identify any potential significant impact to Class I areas. Again, SCC seeks to hold the Executive Secretary to standards beyond those required by state and federal regulations. Other than its generic reference to the preamble of the Air Conservation Act, SCC has failed to allege how any action by the Executive Secretary did not comply with the

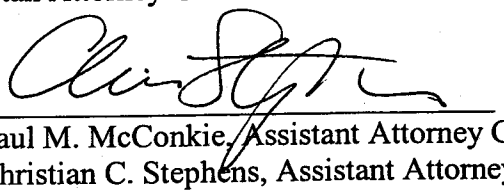
law, this claim presents no factual issue and the Executive Secretary is entitled to judgment as a matter of law.

CONCLUSION

Based upon the above, the Executive Secretary is entitled to judgment as a matter of law. Accordingly, the Executive Secretary respectfully requests that the Air Quality Board grant the Motion for Judgment on the Pleadings as outlined in this supporting memorandum, and issue an order awarding the Executive Secretary the relief requested in the accompanying motion.

Dated this 27th day of February, 2006.

MARK L. SHURTLEFF
Utah Attorney General



Paul M. McConkie, Assistant Attorney General
Christian C. Stephens, Assistant Attorney General

EXHIBIT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

DEC 13 2005

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

Mr. Paul Plath
Senior Partner
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Subject: Best Available Control Technology Requirements for Proposed Coal-Fired Power Plant Projects

Dear Mr. Plath:

Your firm's letter to me dated February 28, 2005, from D. Edward Settle, asks for the U.S. Environmental Protection Agency's (EPA) position regarding whether an analysis of Best Available Control Technology (BACT) for proposed coal-fired power plants must specifically include evaluation of alternative designs of coal-fueled processes such as integrated gasification combined cycle (IGCC). Generally, the Clean Air Act (CAA) requires an applicant to apply BACT as a condition for issuance of a prevention of significant deterioration (PSD) construction permit in an attainment area. This response provides EPA's view of how the CAA should be interpreted and EPA regulations applied under the particular circumstances presented based on prior EPA policy statements and adjudicatory decisions.

There are two different parts of the PSD permitting process where consideration of alternative designs or production processes may occur. One part is under Section 165(a)(2) where it is required that the permitting authority allow an "opportunity for interested persons ... to appear and submit written or oral presentations on the air quality impact of such source, ***alternatives thereto***, control technology requirements, and other appropriate considerations" (emphasis added). The other part is section 165(a)(4), which requires that a proposed facility subject to PSD apply BACT. In Section 169(3) of the CAA, BACT is defined as "an emission limitation based on the maximum degree of reduction ... which the permitting authority ... determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant."

EPA's view is that, through this language, Congress distinguished "production processes and available methods, systems and techniques" that are potentially applicable to a particular type of facility and should be considered in the analysis of BACT from "alternatives" to the proposed source that would wholly replace the proposed facility with a different type of facility. Although we read this language to draw such a distinction, in practice, it is often not clear when another production process should be considered to fit within the BACT definition and when it should be considered an alternative to the proposed source. This distinction is especially difficult to make for coal gasification because the definition of BACT includes "innovative fuel combustion techniques" in a list of examples of production processes or available methods, systems, or techniques to be considered in the BACT analysis. However, even assuming that coal gasification were in all respects an innovative fuel combustion technique for producing electricity from coal, we do not believe Congress intended for an "innovative fuel combustion technique" to be considered in the BACT review when application of such a technique would redesign the proposed source to the point that it becomes an alternative type of facility, which, as discussed below, we believe would be the case if IGCC were applied to a proposed SCPC unit.

As noted in prior EPA decisions and guidance, EPA does not consider the BACT requirement as a means to redefine the basic design of the source or change the fundamental scope of the project when considering available control alternatives. For example, we do not require applicants proposing to construct a coal-fired steam electric generator to consider building a natural gas-fired combustion turbine as part of a BACT analysis, even though the turbine may be inherently less polluting per unit product (in this case electricity). In re SEI Birchwood Inc, 5 E.A.D. 25 (1994); In re Old Dominion Electric Cooperative, 3 E.A.D. 779 (1992).

Therefore, the question in this instance is whether IGCC results in a redefinition of the basic design of the source if the permittee is proposing to build a supercritical pulverized coal (SCPC) unit. In this situation, EPA's view is that applying the IGCC technology would fundamentally change the scope of the project and redefine the basic design of the proposed source. Portions of an IGCC process are very similar to existing power generation designs that we have previously identified as a redefinition of the basic design of source when an applicant proposed to construct a pulverized coal-fired boiler. The combined cycle generation power block of an IGCC employs the same turbine and heat recovery technology that is used to generate electricity with natural gas at other electrical generation facilities. As noted above, we do not require applicants proposing to construct a coal-fired steam electric generator to consider building a gas-fired combustion turbine as part of a BACT analysis. Furthermore, the core process of gasification at an IGCC facility is more akin to technology employed in the refinery and chemical manufacturing industries than technologies generally in use in power generation (i.e., controlled chemical reaction versus a true combustion process). This technology would necessitate different types of expertise on the part of the company and its employees to produce the desired product (electricity) than the typical SCPC unit. Therefore, where an applicant proposes to construct a SCPC unit, we believe the IGCC process would redefine the basic design of the source being proposed.

Accordingly, consistent with our established BACT policy, we would not require an applicant to consider IGCC in a BACT analysis for a SCPC unit. Thus, for such a facility, we would not include IGCC in the list of potentially applicable control options that is compiled in the first step of a top-down BACT analysis. Instead, we believe that an IGCC facility is an alternative to an SCPC facility and therefore it is most appropriately considered under Section 165(a)(2) of the CAA rather than section 165(a)(4).

Your letter did not specifically request guidance on whether IGCC should be considered in a LAER analysis for a SCPC, but I am taking this opportunity to address the issue. As with BACT, an applicant must generally comply with LAER as a condition for issuance of a nonattainment new source review (NSR) permit in a nonattainment area. Section 173(a)(5) of the CAA requires an applicant to conduct, "an analysis of ***alternative sites, sizes, production processes*** and environmental control techniques for such proposed source." (emphasis added). Because we believe IGCC results in a redefinition of the source in this situation, it should not be considered in a LAER analysis for a SCPC unit. Nonetheless, we believe that the technology should be considered under Section 173(a)(5) when an SCPC unit is proposed in nonattainment areas.

I trust that this response addresses the issues raised in your letter.

Sincerely,

Stephen D. Page
Director
Office of Air Quality, Planning
and Standards

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2006, I caused a copy of the foregoing to be mailed by United States Mail, postage prepaid, to the following:

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BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of:	+ Response to Executive Secretary's + Memorandum of Motion For + Judgement on The Pleading
Sevier Power Company Power Plant Sevier County, Utah DAQE -AN2529001-04	+ + + +

The Executive Secretary has requested a judgement on the pleadings, pursuant to Rule 12 (2) of the Utah Rules of Civil Procedure. Sevier County Citizens For Clean Air And Water, submits this response to that request.

A closer look at Rule 12 (2) must be taken when consideration is given to the Executive Secretary's request. Rule 12(6) states, " Motion for judgement on the pleadings. After pleading s are closed but within

such time as not to delay the trial, any party may move for judgment of the pleadings."

Sevier County Citizens For Clean Air And Water goes on record that the magnitude of the Executive Secretary's request would delay the hearing date of the Appeal, as now set for May 10, 2006. The request for judgement of pleadings was filed after a schedule was agreed upon by all parties. Sevier Citizens can not respond in a proper manner in the time frame previously agreed to by all parties. Sevier Citizens will respond to the best of our ability, as time allows.

The Executive Secretary has in his possession all of the documents submitted by Sevier Citizens for several months. This last minute motion for judgement of pleadings will delay the hearing I f granted by the Air Quality Board.

INTRODUCTION

The Air Quality Board granted Sevier County Citizens For Clean Air And Water, Standing and the Right to Intervene which is not disputed by either party. The Executive Secretary claims that, "to

streamline"the process the judgement on the pleadings is a procedural device that allows the Board to resolve claims. "When moving party is entitled to judgement on the face of the pleadings themselves." "Judgement on the pleadings is appropriate when neither party disputes the facts underlying this dispute." Sevier Citizens does dispute the facts.

Sevier Citizens has spent five years organizing, researching, and taking part in the process. To "streamline" or rush the process would be an injustice and an infringe on our right to due process. It is important for both parties to have their say and expect a fair and impartial decision in this matter.

ARGUMENT

The Executive Secretary's argument that the Board may not make rules "more stringent than corresponding federal regulations" is without foundation when he quotes an exception to the rule in his argument. Air Quality permits are issued on a case by case basis. If the requirements for all plants were the same there would be no need for the process. Certainly, a permit should under go a different review process when 183

homes are within 1 3/4 miles of a proposed coal-fired power plant than one with zero population in the area. The impact on the community has been presented in total opposite directions by the backers of the Sevier Power Company. The Notice of Intent under the heading of "Growth Analysis", states, that the SPC project, "would not represent a large influx of a commodity that would spur secondary growth in the Sigurd area. "Hence, the proposed SPC Project is not expected to cause significant growth in the Sigurd area nor significant secondary air quality impacts.

In a recent letter to the citizens of Sevier County, SPC boasts about the large impact the proposed plant will bring to the area. What is fact and what is fiction? Sevier Citizens maintains it will have a huge adverse impact and that it will take a full hearing of the issues to get a true assessment of the facts.

The Executive Secretary lists a number of so-called " Undisputed Facts" and a number of them are disputed by the Sevier Citizens as stated in our Agency Action. The Executive Secretary is projecting a one

sided view that needs to be examined in a public hearing as requested by Sevier Citizens.

Sevier Citizens has attached several documents as examples of the complexity of the issues raised by our organization. A document can not be cross-examined a witness. These documents will demonstrate the need for an examination of all concerns expressed by the citizens of the area.

During a recent Utah Supreme Court hearing involving a "Standing issue" in this very case, one Justice of the Court brought out the idea that Sevier Citizens could very well have a claim for injury in the case with so many people living near the site. Mr. Finlinson, counsel for SPC agreed with the Justice in his reply.

The Sevier County Citizens is entitled to a full and complete hearing in this matter. T he hearing date has been set, so lets move forward and attempt to settle as much of this dispute as possible in this venue.

The Board is being asked to judge whether the Executive Secretary properly applied the rules in his issuance of the Approval Order. The rules being implemented by the Executive Secretary are those rules made by the Board in accordance with Title 63, Chapter 46a, (Utah Administrative Rule making Act) "implementing an operating permit program as required by and in conformity with Titles IV and V of the federal Clean Air Act Amendments of 1990." **SCCAW disputes the statement by the Executive Secretary that "---the Board may not make rules more stringent than the corresponding federal regulations which address the same circumstances." EPA regulations take precedent over state regulations and there is no such statement within federal regulations.**

There are two issues before the Board:

1. **Whether the rules were properly implemented by the Executive Secretary.**
2. **Whether the proper rules were utilized by the Executive Secretary.**

The Executive Secretary addressed what he called "relevant claims" below following the order in which the claims appeared in SCCAW's March 16, 2005 RFA. SCCAW's response to those comments made by the Executive Secretary appear below:

SCCAW Claim 1: UDAQ failed to evaluate the combined emissions of the three proposed coal-fired power plants currently under application in the state of Utah and the effects it would have upon the nearby National Parks.

It is quite illogical that the Executive Secretary should undertake an investigation of just one possible source of emissions when he either knew of, or had in hand, applications from both the expansion of the Hunter plant and the

addition to the IPP Delta plant. Hunter's application was "put on hold" – not withdrawn. While the specifics of the law may pertain to only one application, common sense says that 'when knowing there will be multiple applicants, each of whose emissions will be pooled in a common air space, one should study the combined effects as the sum may be greater than the parts.'

Utah Admin. Code R307-405-6(2) requires that "[e]very new major source ... must be reviewed by the Executive Secretary to determine the air quality impact of the source to include a determination whether the source will cause or contribute to a violation of the maximum allowable increases or the NAAQS in any area" as of "**the sources projected start-up date.**" The Executive Secretary's review "shall take into account all allowable emissions of approved sources or modifications whether constructed or not, and, to the extent practical, the **cumulative effect** on the air quality of all sources and **growth** in the effected area." (emphasis added).

The permits in question (IPP – Delta and Hunter) both fit the definition of "**growth.**"

SCCAW does not agree to the factual basis for this claim and the Executive Secretary should be denied judgment on this claim.

SCCAW Claim 2: Should the petitioner wait until actual injury has occurred, which cannot precede the completion of the SPC project, there can be little redress beyond enforcing the emission limitations of this Approval Order. Therefore the protest must be addressed prior to issuance of the Approval Order.

Since the Executive Secretary agrees that this issue is part of the "standing" that was granted to SCCAW, SCCAW will not challenge its removal from the petition.

SCCAW Claim 3: UDAQ failed to adequately consider the use of IGCC both as a viable method of achieving BACT and as a cost effective way to minimize emissions.

Under the NSR PSD requirements, the facility must show that it will employ the **"best available control technology" (BACT)** for each criteria pollutant emitted. 42 U.S.C., 7475 (a)(4); Utah Admin. Code R307-401-6(1) and R307-401-6 (1) In the Motion for judgment the Executive Secretary states: "In his BACT review, the Executive Secretary did not require consideration of IGCC because IGCC is a separate process and not a control technology.

Environmental Protection Agency "Clean Air Act", Part C, subpart 1, section 169 (3) states "The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting

facility, which the permitting authority, on a case - by - case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application **of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques** for control of each such pollutant. .... (emphasis added)

The process for permit consideration is one of electrical generation. Combustion is only one tool of this process. The Executive Secretary might as well have approved the use of pulverized coal or the burning of chunk coal a la Birmingham, England in 1887. BACT on each of these other types of combustion is significantly different than BACT on a modern, state of the art electrical generating plant. The Executive Secretary is arguing that an opinion letter signed by Stephen D. Page on December 13, 2005 is in fact a rule, regulation or law. It is none of the above – it is merely an opinion. EPA does not state anywhere in their rules that IGCC (or any other combustion technology) need not be analyzed in the application of BACT. In the original NOI filed by NEVCO Energy, IGCC was dismissed with a one line statement **"IGCC was rejected because of the cost."** This is not top down analysis of BACT.

SCCAW shall present an "expert witness" to verify this claim.

This is material fact and the Executive Secretary should be denied judgment on this claim.

SCCAW Claim 6: Maximum predicted concentrations of PM_{10} in areas where the applicant has significant impact would occur along the eastern edge of the proposed site's boundary, and is the result of coal handling processes at the plant.

According to maps published with the Air Quality study conducted by Meteorological Solutions, the greatest impact from PM_{10} would, in fact occur to the northeast of the proposed plant site. This is precisely the area in which there are 183 homes, each within ¾ mile of the proposed plant site. This location is not an industrial setting. This is a residential setting and any emissions limit must recognize this. Special attention must be considered when dealing with a residential community. SCCAW cannot accept any increased PM_{10} emissions over a residential area. This is a material fact and the Executive Secretary should be denied judgment on this claim.

SCCAW Claim 7: Fish Lake National Forest and Dixie National Forest are each in the process of implementing a "scheduled burn" program to improve the quality of the national forests. During the next ten years, each jurisdiction will potentially expel many tons of ash and pollutants into the local atmosphere which, by themselves, may potentially make Sevier Valley

a non-attainment area. This potential is not noted in the NOI and is a major omission in modeling the airshed of Sevier Valley.

SCCAW recognizes that the Executive Secretary took steps to inform the FLMs and to solicit their response and it is not the fault of the Executive Secretary that no response was made. We do feel, however, that the Executive Secretary could have been more persistent in pursuing a response from the FLMs. SCCAW also believes there to be a lack of "oversight of, or cooperation with, the FLM's" Because the FLMs did fail to respond does not relieve the Executive Secretary from his duty to evaluate the impact from, and on, each jurisdiction. Just because a "draft" Smoke Management Plan had not been finalized does not mean that it does not exist, or would not be soon finalized and published.

This is a material fact and the Executive Secretary should be denied judgment on this claim.

SCCAW Claim 10: UDAQ illegally did not consider the impact on waterfowl and wildlife, Chap. 19-2-101(2) 0f the Utah Air Conservation Act. This chapter requires that UDAQ 'prevent injury to plant and animal life and property.' The U.S. Wildlife Service and Utah Div. of Wildlife were never contacted and no studies were undertaken. Migrating waterfowl and others, such as ducks, geese, cranes and eagles, nest and feed in the area. The eagle's main food source in the winter is jackrabbit that frequents the area of the power plant. Not only did UDAQ ignore studies on wildlife and animals, they ignored comments stated during the public comment period on this subject.

SCCAW can find no record of requests to, or involvement by, the Utah Division of Wildlife Resources included within the study submitted by NEVCO energy as part of the NOI, nor can we discover any involvement by the Utah Division of Wildlife Resources during the subsequent review period under the direction of UDAQ. SSSAW will present a photograph of a bald eagle feeding on the property of the proposed SPC site.

The near source review did not include any information as to the effects of the regulated pollutants upon the vast acreage of alfalfa grown within three miles of the proposed plant. This is some of the most productive growing land within Utah. There are numerous studies conducted by and for the Department of Agriculture that document the negative effects of these pollutants upon the growth rate of alfalfa. Even minor reductions in sunlight penetration through the stack emissions of the proposed SPC plant may be sufficient to reduce growth by as much as 40%.

The mountains surrounding Sevier Valley harbor some of the rarer forms of lichens to be found in the state, many of which are also heavily impacted by

small increases in airborne pollution. While the preamble to the Utah Air Conservation Act may be construed as not being an actual law, as determined by The Utah Supreme Court in Price Development vs. Orem City, it is not a mere embellishment or oratorical statement. It is part and parcel to the Act.

This is material fact and the Executive Secretary should be denied judgment.

SCCAW Claim 11: UDAQ did not thoroughly analyze the impact of health issues on citizens (sic) living in the shadow of the (SPC) power plant.

The twenty to thirty individuals who have submitted affidavits as to the negative effects upon their health that could be exacerbated by the proposed SPC power plant do not constitute a "case by case" evaluation. These people each live within two miles of the proposed plant and represent nearly ten percent of the immediate area population. Most suffer from advanced bronchial, asthmatic, or cardio-pulmonary diseases and many moved to this region from other areas to escape such airborne pollution. The Act clearly states that "classes of people" must be protected. There will be sufficient documentation presented to verify the claim that a definite negative impact to the health of this group will be very real based upon the permitted additions to airborne pollutants. Refer to Utah Admin. Code R307-410-4-(III)(A)&(B).

These are factual issues and the Executive Secretary should be denied judgment.

SCCAW Claim 12. UDAQ failed to consider the financial impact of the property values, job loss, and additional medical expenses that the people of Sevier County will suffer from the AO of the Sevier Power Co. permit.

SCCAW does rely upon Utah Admin. Code R307-405-6(2)(B)&(D)as a basis of support for its claim. Section (D) clearly states that "An analysis of the air quality related impact of the source or modification including an analysis of the impairment to visibility, soils, and vegetation and the projected air quality impact from general commercial, residential, industrial, and other growth associated with the source or modification." Statistics from the Utah Department of Workforce Services, the Utah Board of Realtors and economic data collected and published by various counties in central Utah all indicate Sevier Valley is growing more rapidly, and more prosperously, than both Millard and Emery Counties, each of which harbor large coal-fired power plants. This data clearly indicates the subsequent economic growth of Sevier Valley would be negatively impacted by the addition of a coal-fired power plant. This leads to diminished job growth. There has been sufficient health studies conducted throughout the U.S. by reputable and credible agencies to verify that health costs may be expected to increase significantly with the addition of a coal-fired power plant. The actual impacts could be significantly higher than modeling indicated which would create the adverse effect upon both people and property.

This is a factual claim and SCCAW and the Executive Secretary should be denied judgment.

SCCAW Claim 13. UDAQ did not consider the detrimental effects of the Sevier Power Co. plant on the 'natural attractions of this state. (Utah Air Conservation Act Chap. 19-2-101(2)

SCCAW could have been clearer in this claim. In addition to the Class I areas noted by both the Executive Secretary and SCCAW, a significant portion of the income of residents of Sevier Valley comes from tourism. Among these people who travel to, and stay in, Sevier Valley, nearly 20% come to ride the ATV trails, hunt and fish. The wide open vistas from the mountains are the attraction to the ATV riders and the edible fish from the mountain lakes are the attraction to many others. The deer herds are still the best in the state, attracting even more people during hunting season. Tourism alone is a justifiable reason for holding the power plant applicant to a higher standard. There is no way in the world that any revenue filtering down to the local population could ever replace that revenue derived from tourism.

This is a factual issue and the Executive Secretary should be denied judgment.

CONCLUSION

Based upon the above statements of fact, the Executive Secretary should be denied judgment on the motion presented before the Air Quality Board dated 27th day of February, 2006

Motion for denial submitted on 13 March, 2006

Sevier Citizens for Clean Air and Water

James Kennon

James Kennon, President

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2006, I caused a copy of the foregoing to be mailed by United States Mail, postage prepaid to the following:

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WASHINGTON, DC 20510-4402

COMMITTEES:

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HEALTH, EDUCATION, LABOR, AND PENSIONS

INTELLIGENCE

JOINT COMMITTEE ON TAXATION

August 31, 2005

Ms. Cindy Roberts
1490 N. State Street, Box 570081
Sigurd, Utah 84657

Dear Ms. Roberts:

Thank you for writing to express your opposition to coal-fired power plants and your support for renewable energy. As always, I welcome the opportunity to respond.

President George W. Bush signed the omnibus energy bill (H.R. 6) into law on August 8, 2005. As you correctly note, I was one of the conferees who negotiated the final version of the bill signed by the President. While I appreciate your continued opposition to coal-fired electricity generation, I have differing views. Our nation currently faces an energy crisis. The cost of natural gas, oil, and other energy resources continues to rise. I believe that Utah's vast coal resources can help address our nation's energy needs.

Ms. Roberts, I understand your concern about the impact of coal-fired power plants on the environment. In my view, we should be good stewards of the environment and protect it from harmful activities. For that reason, I worked to protect provisions in the energy bill that promote clean coal technology. Such technology can significantly improve efficiency and make coal-fired plants cleaner than ever before. In addition, investment in clean coal technologies will create 62,000 new jobs in our nation, including 10,000 research jobs in fields such as math, engineering, and physics. I firmly believe that clean coal can help reduce pollution emissions and improve local economies.

All that said, I am a strong proponent of seeking alternative sources of energy in the United States. I believe we must take a balanced approach that uses wind power, solar, and other renewable energy sources. You may be pleased to know that H.R. 6 contains several provisions that will help promote the use of renewable energy in our nation.

Let me outline some of the measures H.R. 6 takes to increase environmental standards, encourage energy conservation, and promote alternative sources of energy. Incentives for energy efficiency and conservation are provided in H.R. 6 through

numerous tax credits for such things as the construction of energy-efficient homes, energy efficient appliances, and the manufacture of fuel cell technologies. It also authorizes significant funding increases for Department of Energy (DOE) renewable energy programs including wind power, photovoltaics, solar thermal, biomass and biofuel, geothermal, hydrogen, hydropower, and electric energy systems and storage.

Additionally, H.R. 6 includes the Conserve by Bicycling program, the Clean School Bus program, and the Hydrogen and Fuel Cell program. It also includes programs such as the Energy Efficient Public Buildings program, the Energy Efficient Appliance Rebate program, a Diesel Emissions Reduction program, and many others.

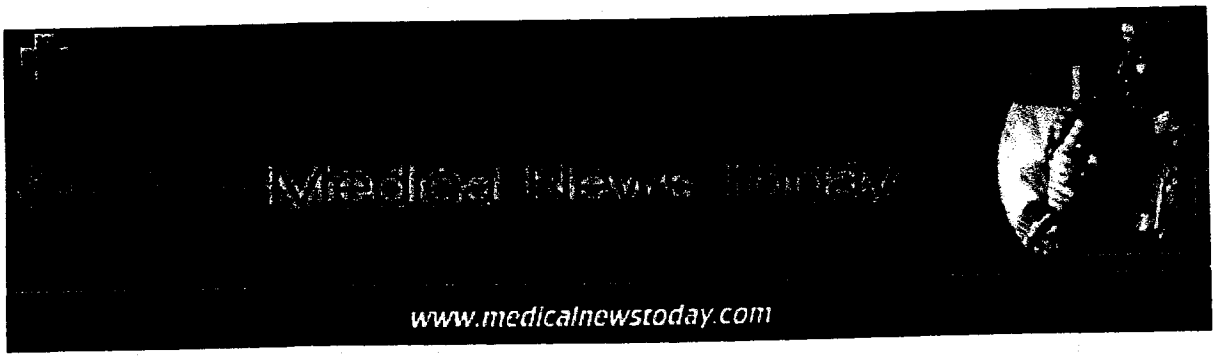
H.R. 6 also contains a major provision I authored, the Clean Efficient Automobiles Resulting from Advanced Car Technologies Act (CLEAR ACT, S. 971) that promotes alternative sources of energy. By providing tax credits, the CLEAR ACT promotes the advanced technologies being pursued by auto manufacturers to reduce emissions and improve efficiency. These technologies include fuel cell, hybrid electric, alternative fuel, and battery electric vehicles. The CLEAR ACT uses tax incentives to lower three barriers to the acceptance of these important alternatives: the cost of the vehicles; the cost of alternative fuels; and the lack of an infrastructure of alternative fueling stations. The CLEAR ACT ensures that automobiles qualifying for the CLEAR ACT credit must be dedicated to the use of alternative energy sources. A number of national environmental groups have strongly endorsed the CLEAR ACT, including the Natural Resources Defense Council, the Union of Concerned Scientists, and Environmental Defense.

Again, thank you for bringing your views to my attention.

Sincerely,

Orrin G. Hatch
United States Senator

OGH:jajj



No Safe Level For Ozone, Study Finds

20 Feb 2006 Click to Print

Even at very low levels, ozone--the principal ingredient in smog--increases the risk of premature death, according to a nationwide study to be published in the April edition of the journal Environmental Health Perspectives.

The study, sponsored by the Environmental Protection Agency and the Centers for Disease Control, found that if a safe level for ozone exists, it is only at very low or natural levels and far below current U.S. and international regulations. A 10 part-per-billion increase in the average of the two previous days' ozone levels is associated with a 0.30 percent increase in mortality.

The current study builds on research published in November 2004 in the Journal of the American Medical Association, which was the first national study of ozone and mortality.

"This study investigates whether there is a threshold level below which ozone does not affect mortality. Our findings show that even if all 98 counties in our study met the current ozone standard every day, there would still be a significant link between ozone and premature mortality," said Michelle Bell, lead investigator on the study and assistant professor of environmental health at the Yale School of Forestry & Environmental Studies. "This indicates that further reductions in ozone pollution would benefit public health, even in areas that meet regulatory requirements."

Researchers found that even for days that currently meet the EPA limit for an acceptable level of ozone--80 parts per billion for an eight-hour period--there was still an increased risk of death from the pollutant.

An effort is now under way by the EPA to consider whether more stringent standards for ozone are needed. The agency is mandated to set regulations for ozone under the Clean Air Act. Ozone, a gas that occurs naturally in the upper atmosphere, is created in the lower atmosphere when vehicle and industrial emissions react with sunlight. Levels typically rise when sunlight and heat are highest in the summer.

"Over 100 million people in the United States live in areas that exceed the National Ambient Air Quality Standard for ozone. Elevated concentrations of ozone are also a growing concern for rapidly developing nations with rising levels of ozone from expanding transportation networks," said Francesca Dominici, co-author of the study and associate professor of biostatistics at Johns Hopkins.

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The study is online at http://ehp.niehs.nih.gov/docs/2006/8816/abstract.html

Yale School of Forestry & Environmental Studies http://www.yale.edu/forestry/

Information on Michell Bell: http://www.yale.edu/forestry/bios/bell.html

Contact: Janet Rettig Emanuel

YAHOO! MAIL

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Date: Wed, 22 Feb 2006 12:57:03 -0600 (CST)

From: "U.S. EPA" <USAEPA@govdelivery.com>

Subject: Air News Release: EPA Releases Second National Assessment of Toxic Air Pollutants

To: sccaw@yahoo.com

News for Release: Wednesday, Feb. 22, 2006

U.S. Environmental Protection Agency (EPA)

EPA Releases Second National Assessment of Toxic Air Pollutants

Contact: John Millett, 202-564-4355 / millett.john@epa.gov

(Washington, D.C.-02/22/06) EPA has released an important tool to guide further local, state and federal steps to cut toxic air pollution and build upon the significant emissions reductions achieved since 1990. The second National-Scale Air Toxics Assessment (NATA) is a state-of-the-science screening tool that estimates cancer and other health risks from exposure to air toxics.

"Since 1990, we've significantly cut toxic emissions and risks in the United States," said Acting EPA Assistant Administrator for Air and Radiation Bill Wehrum. "This tool will help EPA and states refine our understanding and approaches to further reduce air toxics. With strong industrial standards already in place, our efforts to cut risks from toxic pollution will rely on more advanced technology, more sophisticated analysis, and enhanced cooperation among federal, state and local agencies."

The United States has made significant progress in reducing air toxics from industry, fuels and vehicles, and indoor sources. Since the Clean Air Act was amended in 1990, EPA has issued 96 standards for 174 different types of industrial sources of air toxics, including chemical plants, oil refineries, aerospace manufacturers and steel mills. The agency also has issued regulations for 15 categories of smaller sources, such as dry cleaners, commercial sterilizers, secondary lead smelters and chromium electroplating facilities. Together, these standards are projected to reduce annual emissions of air toxics by about 1.7 million tons from 1990 levels when fully implemented. These reductions are not fully reflected in this assessment, however, because a number of these regulations took effect after 1999.

Vehicles and fuels also emit air toxics. EPA's current and future fuels and vehicles programs will reduce air toxic emissions by another 2.4 million tons in 2020, compared to 1990 levels.

NATA is not designed to be used as the sole basis for regulatory action. The results of the assessment, however, will help EPA and state and local air quality regulators identify pollutants and sources of greatest concern and set priorities for addressing that pollution. NATA also will help identify areas where EPA needs to collect additional information to improve the understanding of risks from air toxics exposure.

NATA covers 177 of the Clean Air Act's list of 187 air toxics plus diesel particulate matter. For 133 of these air toxics (those with health data based on chronic exposure) the assessment includes estimates of cancer or non-cancer health effects including non-cancer health effects for diesel particulate matter. EPA develops NATA in cooperation with state and local environmental agencies, which provide key information about air toxics emissions.

The assessment estimates that in most of the United States people have a lifetime cancer risk from air toxics between 1 and 25 in a million. This means that out of one million people, between 1 and 25 people have increased likelihood of developing cancer as a result of breathing air toxics from outdoor sources, if they were exposed to 1999 levels over the course of their lifetime (70 years). The assessment estimates that most urban locations have an air toxics lifetime cancer risk greater than 25 in a million. Risk in transportation corridors and some other locations is greater than 50 in a million. In contrast, one out of every three Americans (330,000 in a million) will develop cancer during a lifetime, when all causes (including exposure to air toxics) are taken into account.

The second NATA expands on EPA's first national-scale assessment with a more complete emissions inventory and the latest health effects information. The first assessment, based on 1996 data, was release in 2002. The methods used for the assessments were peer-reviewed and endorsed by EPA's Science Advisory Board in 2001.

EPA plans to develop new national-scale assessments as inventory data from subsequent years become available. The next such analysis will focus on exposure and risks from 2002 emissions.

For more information about the National-Scale Air Toxics Assessment, visit:
http://www.epa.gov/ttn/atw/natamain/

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BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Sevier Power Company Power Plant Sevier County, Utah DAQE-AN2529001-04	EXECUTIVE SECRETARY'S REPLY TO SEVIER COUNTY CITIZENS' RESPONSE TO MOTION FOR JUDGMENT ON THE PLEADINGS

The Executive Secretary of the Utah Air Quality Board ("Executive Secretary") hereby replies to the memorandum filed by Sevier County Citizens for Clean Air and Water ("Sevier County Citizens") or ("SCC") opposing the Executive Secretary's Motion for Judgment on the Pleadings. The Executive Secretary reiterates that he is entitled to judgment as a matter of law on claims 1, 2, 3, 6, 7, 11, 12, and 13 raised in Sevier County Citizen's Request for Agency Action because those claims present no genuine issue of material fact.

ARGUMENT

Sevier County Citizens' Opposition Memorandum presents miscellaneous arguments in addition to its specific claims. The Executive Secretary responds to these contentions first, and then provides specific replies to the claims raised in SCC's Request for Agency Action.

I. Extraneous Arguments Raised by Sevier County Citizens

A. Granting the Motion for Judgment on the Pleadings will not Delay the Hearing.

SCC contends that granting the Motion for Judgment on the Pleadings would delay the May 10, 2006 hearing. The scheduling order (agreed upon by all parties) specifically allows dispositive motions, and the Executive Secretary's motion was timely made. Thus, the Executive Secretary sees no reason to postpone the May 10, 2006 hearing.

B. No Material Facts Exist as to the Claims in Question.

SCC contends that judgment on the pleadings is inappropriate because factual disputes remain on the claims. Yet SCC does not dispute any of the facts in the Executive Secretary's "Statement of Undisputed Facts." SCC's memorandum shows that neither party disputes the factual basis for each claim. Rather, the issue is whether the Executive Secretary properly applied those regulations. The latter is a question of law and therefore appropriate for judgment on the pleadings.

C. The Executive Secretary May Not Add More Stringent Requirements to the Permitting Process.

With one exception (not applicable here), the Board may not make rules more stringent than corresponding federal regulations addressing the same circumstances. Utah Code Ann. §19-2-106(2). SCC's contention that the Executive Secretary could and should have required a more stringent process than provided for by the rules is misplaced and wrong. Utah Code Ann. §19-2-106(2) is an administrative rule-making provision. This is not a rule-making proceeding. Further, SCC's contention that the Executive Secretary's review did not consider the close approximation of homes in relation to the proposed power plant fails to take into account the purpose of the extensive air quality analysis which the rules require. This includes extensive modeling evaluating of numerous factors and variables all designed to assure the proposed facility meets health-based air quality standards

II. Executive Secretary's Reply to Sevier County Citizens' Specific Claims

A. SCC Claim 1: In its Opposition Memorandum, SCC simply repeats its contention that Utah Admin. Code R307-405-6(2) requires the Executive Secretary to evaluate potential impacts from allowable emissions from other proposed coal-fired power plants currently under application or whose application may currently be placed "on hold." This rule only applies to "approved" sources, and the Executive Secretary cannot require more than what the rules permit.

No dispute exists as to the lone material fact raised by this claim: that the Executive Secretary did not require evaluation of unapproved sources in the SPC permitting process. Accordingly, judgment as a matter of law is appropriate.

B. SCC Claim 2: Because SCC concedes that this claim presents no issue of material fact and does not oppose dismissal, the Executive Secretary is entitled to judgment as a matter of law.

C. SCC Claim 3: SCC contends that the Executive Secretary failed to require consideration of IGCC in the BACT analysis for the SPC facility. Utah Admin. Code R307-1-101-2 defines BACT as an "emission limitation" to control emissions from an "emitting installation" that the Executive Secretary "determines is achievable for such installation . . . ." Thus, application of BACT depends on the type of installation selected, a choice made by the applicant.

While SCC correctly observes that "[t]he process for permit consideration is one of electrical generation," let us not forget that the purpose of the Best Available *Control* Technology analysis is not to pre-determine the installation's process, but to determine an *emission limitation* based on the applicant's selected process. This determination can only take place only *after* the source selects the process. Under SCC's interpretation, "best available control technology" would instead read "best available process technology" or "best available combustion technology," and would require either that a second installation be built or that an

entirely different installation (IGCC) be built. The Executive Secretary agrees with the EPA's that such an interpretation would be a misapplication of the rule and conflict with the definition of BACT as an "emission limitation" and conflicts with the definition of installation, which states that "[p]ollution equipment shall not be considered a separate installation or installations." Utah Admin. Code R307-1-101-2.

The Executive Secretary does not dispute the only material allegation SCC makes in this claim: that he did not require consideration of ICGG in the BACT analysis for the SPC facility. Because that material fact is undisputed, judgment for the Executive Secretary is appropriate as a matter of law.

D. SCC Claim 6: Although SCC contends that air quality studies should account for the impact from PM_{10} concentration upon a residential setting, nowhere in its claim does SCC distinguish between lawful emissions of PM_{10} and what it believes to be the harmful level of emissions. SCC instead makes the generic statement that the greatest impact from PM_{10} would be near homes. The permit process ensures that all relevant factors are accounted for, including effects on human health.

This allegation fails to state a claim and therefore presents no issue of material fact. Accordingly, the Executive Secretary is entitled to judgment as a matter of law.

E. SCC Claim 7: In its response on the "scheduled burn" program issue in National Forests, SCC concedes that the Executive Secretary complied with the rules by notifying the appropriate Federal Land Managers ("FLM"). SCC now contends that the Executive Secretary "could have been more persistent" in following up with the FLMs. This is a red-herring issue. Scheduled burns are deemed as a temporary nonsource which would not make a difference in background levels for purposes of modeling, but also, any future scheduled burns would have to comply with a smoke management program administered by the forest service. SCC's

contention that the mere existence of a draft plan requires evaluation of such a plan ignores the rule that governs that aspect of the review. The Executive Secretary does not dispute the only material fact raised by this claim: that he did not require consideration of the draft burn plan. Accordingly, judgment as a matter of law is appropriate on this claim.

F. SCC Claim 10: The Executive Secretary has acknowledged that he did not conduct a separate wildlife study or contact the various agencies noted by SCC, because the rules do not require separate studies. This claim therefore presents no issue of material fact, and judgment as a matter of law is appropriate.

G. SCC Claim 11: The lone factual question raised by SCC's claim is whether "a study of health issues was undertaken . . . ." The Executive Secretary does not dispute that a person-by-person health study was not performed; the rules do not require such a study. As previously noted, the NAAQS are health-based standards set at levels that protect human health, including sensitive populations. This claim therefore presents no factual issue and the Executive Secretary is entitled to judgment as a matter of law.

H. Claim 12: SCC contends that R307-405-6(2)(a)(i)(D) requires that the Executive Secretary consider the financial impact on the local residents of property values, job loss, and additional medical expenses if the plant is built. However, R307-405-6(2)(a)(i)(D) states that the applicant must submit an analysis of the ". . . . projected air quality impact *from* general commercial, residential, industrial, and other growth associated with the source or modification" (emphasis added) – not the projected impact *on* those things from projected air quality.

This claim presents no issue of material fact, and the Executive Secretary is entitled to judgment as a matter of law.

I. Claim 13: SCC's contention that UDAQ was required to and failed to consider impacts the power plant would have on the natural attractions of the area and its impact on

tourism is without merit. Other than citing the preamble, SCC now alleges detrimental impact on tourism yet cannot site the rule which would bring with it the requirement of assessing such a subjective review. This claim therefore presents no issue of material fact and the Executive Secretary is entitled to judgment as a matter of law.

CONCLUSION

In each of the above claims and other issues raised by SCC, SCC seeks to hold the Executive Secretary to standards beyond those required by state and federal regulations. The Executive Secretary has demonstrated that on each of the claims no genuine issue of material fact exists. Accordingly, the Executive Secretary respectfully requests that the Air Quality Board grant the Motion for Judgment on the Pleadings in its entirety.

DATED this 20th day of March, 2006.

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BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier Power Company, 270 MW Coal-Fired Power Plant, Sevier County Project Code: N2529-001 DAQE-AN2529001-04	**PACIFICORP'S REPLY TO THE SEVIER COUNTY CITIZENS FOR CLEAN AIR AND WATER'S OPPOSITION TO THE EXECUTIVE SECRETARY'S MOTION FOR JUDGMENT ON THE PLEADINGS**

PacifiCorp, in its amicus status[1], hereby submits this reply brief ("Reply") to the Sevier County Citizens for Clean Air and Water's ("SCC") opposition brief ("Opposition") to the Executive Secretary's Motion for Judgment on the Pleadings. PacifiCorp's Reply focuses exclusively on SCC's Claim #3, that "*UDAQ failed to adequately consider the use of IGCC both*

[1] PacifiCorp was granted amicus status in the Utah Air Quality Board's ("Board") Order of May 12, 2005.

as a viable method of achieving BACT and as a cost effective way to minimize emissions" (the "IGCC/BACT Legal Issue").

I. OVERVIEW

On October 12, 2004, the Utah Division of Air Quality ("UDAQ") issued an Approval Order ("AO") granting a Prevention of Significant Deterioration ("PSD") permit to the Sevier Power Company ("Sevier Power") to construct and operate a circulating fluidized bed, coal-fired power plant ("CFB Boiler") in Sigurd, Sevier County, Utah ("Sigurd Plant"). On November 1, 2004, SCC filed its Request for Agency Action ("First RFA") with the Board contesting the AO. On March 16, 2005, SCC filed another document attempting to further contest the AO ("Second RFA"). In its Second RFA, SCC asserts fourteen separate claims. In its Motion for Judgment on the Pleadings, the Executive Secretary moves to dismiss most of SCC's claims, including Claim #3. PacifiCorp, in its amicus status[2], limits this Reply to SCC's Claim #3.

II. BACKGROUND

Under the Clean Air Act's New Source Review provisions, a party intending to construct a "major" new source, or undertake a "major modification" to an existing major source, in a NAAQS attainment area must first obtain a PSD permit. 42 U.S.C. § 7475(a). Under the PSD requirements the applicant must demonstrate, among other things, that the new source will

[2] Sierra Club and the Grand Canyon Trust ("SC/GCT") likewise were granted amicus status. Thus, SC/GCT have the same opportunity as PacifiCorp to present briefs and make oral arguments regarding SCC's Claim #3. Curiously, SC/GCT have chosen to forgo this opportunity because they don't like the participation limits set by the Board. *See* SC/GCT's letter dated March 13, 2006 and entitled Declining to Participate as Amicus in the Matter of Sevier Power Company Power Plant ("Declination Letter"). Specific to SCC's Claim #3, however, SC/GCT's Declination Letter should be seen as nothing more than a not-so-veiled attempt to preserve the right to argue this same IGCC/BACT Legal Issue at another time in regards to a different AO. This attempt by SC/GCT must fail. The IGCC/BACT Legal Issue is before the Board at this time and in this matter. Neither SC/GCT, PacifiCorp nor any other party gets to choose when this important legal and policy issue will be decided. SC/GCT's decision not to participate means only that SC/GCT has elected not to have any role as the Board considers this important legal and policy issue which will potentially set precedent for future AOs. (PacifiCorp replies separately to SC/GCT's Declination Letter in PacifiCorp's March 20 Reply to Sierra Club and Grand Canyon Trust's Declination to Participate Further as Amicus.)

employ BACT for each criteria pollutant emitted. 42 U.S.C. § 7475(a)(4); Utah Admin. Code R307-401-6(1).

Under the applicable Utah regulations, BACT is defined as follows:

> [A]n emission limitation and/or other controls to include design, equipment, work practice, operation standard or combination thereof, based on the maximum degree or reduction of each pollutant subject to regulation under the clean Air Act and/or the Utah Air conservation Act emitted from or which results from any emitting installation, which the Air Quality Board, on a case-by-case basis taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such installation through application of *production processes and available methods, systems, and techniques*, including fuel cleaning or treatment or innovative fuel combustion techniques for control of each such pollutant...."

Utah Admin. Code. R307-101-2(4)(emphasis added)[3]

A "top-down" method for determining BACT has been implemented and recommended by EPA, and is required by Utah. *See* EPA Memorandum re Improving NSR Implementation; 61 Fed. Reg. at 38, 272-73; Utah NOI Guide, Form 1b. This mandatory top-down method includes 5 separate steps: (1) identify all available control technologies (the "First Step"), (2) eliminate technically infeasible control technologies, (3) rank remaining control technologies by effectiveness, (4) evaluate the most effective controls (assessing the energy, environmental and economic impacts), and (5) select the most effect remaining option. EPA's New Source Review Workshop Manual ("NSR Manual"), at B.5. In the course of the BACT analysis, one or more of the options may be eliminated because they are demonstrated to be technically infeasible or have unacceptable energy, environmental or economic impacts on a case-by-case basis. However, the First Step is to identify all available control technology options. It is this First Step that is the subject of SCC's Claim #3.

[3] Utah's BACT definition is substantially similar to the federal definition. *See* 42 U.S.C. § 7479(3).

III. ARGUMENT

The issue in Claim #3 is whether UDAQ was required to identify, include and consider IGCC as an available control technology in its BACT analysis.[4] SCC asks the Board to determine that applicable state statutes and regulations require a proposed power plant that has already selected another type of electrical production technology (in this case, a CFB Boiler coupled with an electrical generator) to include an altogether different electrical production technology (IGCC) in the BACT analysis.[5]

At its core, SCC's Claim #3 is a matter of statutory and regulatory interpretation. This becomes an important legal and policy issue because the effect of SCC's argument is not necessarily limited to the Sigurd Plant. Rather, the effect could be that IGCC – as a matter of law –must be considered for any proposed project that intends to use coal for fuel, including the Sigurd Plant. In that sense, SCC is not asking the Board to apply the various BACT steps and decide that IGCC represents BACT only for the Sigurd Plant; rather, SCC is asking that the Board conclude, as a matter of law, that IGCC must be included in a BACT analysis for the Sigurd Plant and any other proposed source that intends to use coal for fuel. If SCC's dramatic reinterpretation of existing statute and regulations is accepted for the Sigurd Plant, that same reinterpretation may be applied to any other coal plant seeking an AO in Utah. *See Salt Lake Citizen's Cong. v. Mountain States Tel. & Tel. Co.*, 846 P. 2nd 1245, 1252 (Utah

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[4] In its Second RFA and in its Opposition SCC captions the issue in mistaken manner. SCC's caption asserts that "UDAQ failed to adequately consider the use of IGCC both as a viable method of achieving BACT and as a cost effective way to minimize emissions." The issue or test is not whether IGCC is a "viable method" of achieving BACT, or whether IGCC is a "cost effective" way of achieving BACT. Rather, the issue is whether the BACT definition should be interpreted to require the inclusion of IGCC.

[5] PacifiCorp is not opposed to of IGCC as a generating technology. Indeed, PacifiCorp's most recent 2004 Integrated Resource Plan and the even more recent 2004 Integrated Resource Plan (IRP) Update Report includes IGCC among its prospective generating resources. PacifiCorp is adamantly opposed, however, to IGCC being required as part of a BACT analysis for a proposed facility simply because it intends to use coal as a fuel source.

1992)("Administrative agencies, like courts, have authority to establish rules of law and they do so in two ways by promulgating rules and by issuing decisions as a necessary incidence of adjudication. Rules of law developed in the context of agency adjudication are as binding as those promulgated by agency rule making; thus, rules of law established by adjudication apply to the future conduct of all persons subject to the jurisdiction of an administrative agency."); Kenneth Cup Davis & Richard J. Pierce, Administrative Law Treatise ("Davis & Pierce Treatise") § 11.5 (4th ed. 2002) (agencies must generally follow their own precedents or interpretations, or explain why they have departed from them); *Atchison, Topeka & Santa Fe R. v. Wichita Bd. Of Trade*, 412 U.S. 800, 808 (1973).

A. BACT is Not a Means to Redefine the Source

By claiming that UDAQ failed to include the use of IGCC in its BACT analysis, SCC is arguing that a BACT review can be used as a means to force an applicant for an AO to redefine the proposed source. SCC's interpretation is contrary to the plain language of the BACT requirement, established federal policy, a recent reaffirmation by EPA of that federal policy, and Utah state policy.[6]

1. **The BACT Definition:** The BACT definition requires that "production processes and available methods, systems and techniques" that are potentially applicable to the proposed source be included in a BACT analysis. However, BACT does not require that altogether different "alternatives" to the proposed source, that would replace the proposed source with a different type of source, be included. Instead, the BACT analysis need only include the

[6] SCC asserts in its Opposition that it "shall present an 'expert witness'" to corroborate its interpretation of the BACT definition. Significantly, the deadline set forth in the Amended Schedule to identify witnesses and to exchange witness lists (both fact and expert witnesses) has already lapsed (2/15/06) and SCC failed to submit any list. More importantly, the IGCC/BACT Legal Issue is just that -- a legal (rather than factual) issue -- that will be resolved by interpretation of the regulatory BACT definition. Accordingly, expert testimony on this issue will neither be needed nor allowed.

"available control technologies" for the particular emission source that the applicant has elected to propose.[7] In this case, the applicant, Sevier Power, has elected to propose a CFB Boiler emission source. Sevier Power has not proposed a geothermal source, or a gas-fired source, or an IGCC source; rather, Sevier Power has proposed a CFB Boiler source. *In re Spokane Regional Waste-to-Energy Applicant, PSD App. No. 88-12,* 1989 WL 266360, n.7 (EPA June 9, 1989) ("EPA has not required a PSD applicant to change the fundamental scope of its project.").[8]

2. Established Federal Policy: Under the long-established practice of the EPA, the applicant proposes the particular type of source, and then through the BACT analysis the applicant identifies available control technologies for the particular type of source that the applicant has proposed.[9] SCC's attempted manipulation of the BACT analyses process as its tool

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[7] By asserting in its Opposition that "[c]ombustion is only one tool" for this process of permitting, SCC confusingly implies that the primary objective of creating and permitting a new source is to control emissions rather than to generate electricity. Under the well-established permitting process, the applicant proposes the particular source, and then, through the BACT process, an appropriate emission control is put into place. It is the prerogative of the applicant to propose the type of source, whether gas-fired, IGCC, perhaps even chunk coal (as referenced by SCC) or some other source, and then, through the BACT process, an appropriate emission control specifically tailored to the selected source is put into place.

[8] It is herein that SCC misapplies the BACT process. BACT requires that "available control technologies" be considered, not every other conceivable type or source of combustion as SCC argues in its Opposition. SCC nonsensically states that EPA's regulations do not expressly provide that IGCC may be excluded from a BACT analysis. Indeed the regulations do not expressly provide that IGCC may be excluded, just like they do not expressly provide that gas-fired combustion turbines, geothermal turbines, wind turbines or any one of a number of other alternative types of sources can be excluded from the BACT analysis for a proposed CFB Boiler power plant (although they obviously can).

[9] In *In re Pennsauken County, New Jersey Resource Recovery Facility*, PSD Appeal No. 88-8, 1988 WL 249035 (EPA November 10, 1988), the EPA's Environmental Appeals Board ("EAB") clarified that "[t]he first step in this approach is to determine, *for the emission source in question*, the most stringent control available .... *[T]he conditions themselves are not intended to redefine the source*, as petitioner [] would have them do. In other words, *the source itself is not a condition of the permit.*" The petitioner's "fundamental objections to the ... permit [we]re not with the control technology, but rather, with the municipal waste combustor itself." The petitioner urged the rejection of the proposed waste combustor in favor of co-firing a mixture of refuse and coal at existing power plants. The EAB held that such objections to the source proposed, rather than to the control technologies identified, were "beyond the scope of this proceeding and therefore are not reviewable. Under 40 C.F.R. § 124.19, the review is restricted to the 'conditions' in the permit." The decision goes on to provide that "[t]he permit conditions that define these systems are imposed on the source as the applicant has defined it. Although imposition of the conditions may, among other things, have a profound effect on the viability of the proposed facility as conceived by the applicant, the conditions themselves are not intended to redefine the source, as petitioner [] would have them do. In other words, the source itself is not a condition of the permit." (emphasis added). *See also* In *Spokane Regional Waste-to-Energy*, PSD Appeal No. 88-12, 1989 WL 266360 (EPA June 9, 1989)(In framing the scope of the first step of the

to force an applicant to change "the emission source in question," to "redefine the source" or to "change the fundamental scope of its project" would be a dramatic contortion and misuse of the First Step of the BACT analysis. IGCC is a fundamentally different type of source than the proposed CFB Boiler,[10] and SCC's suggested reinterpretation of the BACT requirement would require the applicant to redefine the proposed source.

3. **EPA's Recent Reaffirmation of Federal Policy:** In a December 13, 2005 letter from Stephen D. Page, Director of EPA's Office of Air Quality, Planning and Standards, attached hereto as Exhibit A, EPA just recently reaffirmed its long-established interpretation of the BACT definition and its policy of not requiring IGCC to be considered in such BACT analyses ("EPA's Reaffirmation Letter"). In EPA's Reaffirmation Letter, EPA confirmed that "[a]s noted in prior EPA decisions and guidance, *EPA does not consider the BACT requirement as a means to redefine the basic design of the source or change the fundamental scope of the project when considering available control alternatives.* For example, we do not require applicants proposing to construct a coal-fired steam electric generator to consider building a natural gas-fired combustion turbine as part of a BACT analysis, even though the turbine may be inherently less polluting . . . ." (emphasis added). The EPA concludes by stating that "we would not include IGCC in the list of potentially applicable control options that is compiled in the first step of a top-down BACT analysis. Instead, we believe that an IGCC

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analysis (identifying "all available control technologies"), the EAB stated that "a technology is obviously not available in any meaningful sense if knowledge about its effect on emissions, *in the particular configuration in which it would be employed*, is so incomplete as to be unusable." (emphasis added)*); In re Brooklyn Navy Yard Resource Recovery Facility*, PSD App. No. 88-10, 1992 WL 80946 (EPA February 28, 1992)(EAB stated that its "decision to remand this permit for consideration of source separation for NOx control is *not intended to result in any reconfiguration of the Brooklyn facility or significant change in its planned usage.*")(emphasis added)).

[10] Generating electrical power through using coal and IGCC technology involves "gasifying" coal and then combusting the gas to power a gas turbine, while the exhaust gases are heat exchanged with water/steam to generate additional electricity through a steam turbine. This process is very different from a CFB Boiler with its associated steam turbines currently proposed by Sevier Power.

facility is an alternative . . . ." SCC's proposed reinterpretation flatly and unequivocally contradicts EPA's Reaffirmation Letter.[11]

4. **UDAQ Policy:** UDAQ has already twice taken the position that the BACT requirement does not oblige the applicant for a particular proposed source to consider using a completely different source as a means to reduce emissions.[12] More specifically, UDAQ has taken the position that the BACT requirement does not require the applicant for a coal-fueled electricity generating facility to consider using IGCC. Administrative agencies must generally follow their own precedents or interpretations, or explain why they have departed from them. Davis & Pierce Treatise, § 11.5; *Atchison,* 412 U.S. at 808; *JSG Trading Corp. v. Dep't of Agriculture*, 176 F.3d 536 (D.C. Cir. 1999) (reversing agency for construing new definition of statutory term without explanation); *Contractors Transport Corp. v. U.S.*, 537 F.2d 1160, 1162 (4th Cir. 1976) ("the grounds for an agency's disparate treatment of similarly situated applicants must be reasonably discernible from its report and order"). The Board should follow the established interpretation on the IGCC/BACT Legal Issue. In light of the established federal

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[11] SCC dismisses EPA's Reaffirmation Letter as "merely an opinion." Of course, it is much more than that; it is a reaffirmation of EPA's long-established interpretation of the existing BACT definition and its policy of not requiring IGCC to be included in such analyses. As discussed above, this is neither a new interpretation nor a new policy. The interpretation of the Clean Air Act's implementing regulations is not only within EPA's discretion, it is within EPA's mandate. Indeed, courts and administrative hearing boards appropriately give due deference to the agencies charged with implementing such statutes and regulation.

[12] In this matter UDAQ previously determined that "BACT is used as a control technology *after* selection of the process to be so controlled. In BACT guidance issued by EPA it states that, '[h]istorically, EPA has not considered the BACT requirement as a means to redefine the design of the source...'" September 27, 2004 Memorandum to Sevier Power Plant File, at 30 (emphasis added). UDAQ went on to conclude that "[t]he process chosen by the source needs to be made based on the requirements of the source and the site selected for its installation. Control techniques are *then* applied to reduce the emissions of that process." *Id.* (emphasis added).

UDAQ has also determined in another matter that IGCC is not BACT because such would require "redefining the design of the source," and because IGCC is not a "control technology" under BACT. October 14, 2004 Memorandum to IPSC File, at 4. UDAQ went on to conclude that "[n]either federal nor state clean air laws require this." *Id.* at 5. " In refuting claims that IGCC should be included in the BACT analysis, UDAQ also relied on EPA's statements on the subject. "Historically, EPA has not considered the BACT requirement as a means to redefine the design of the source when considering available control alternatives." *Id.* at 4.

precedent, and the recent EPA Reaffirmation Letter confirming the established federal precedent, and the established state precedent, it would be very difficult for the Board to articulate an explanation justifying a departure from those precedents.[13]

B. Only "Available" Technologies "Demonstrated" on a "Full Scale Operations" Basis Need be Included in BACT Analysis

Under the First Step of the mandated, top-down BACT analysis, the applicant must "identify all available control technology options." However, the "available" options are only "those control technologies or techniques with a practical potential for application to the emission unit." NSR Manual, at B.5. The NSR Manual further provides that applicants are only expected to identify "demonstrated and potentially applicable control technology alternatives." NSR Manual at B.11. "Technologies that have not been applied to (or permitted for) full scale operations need not be considered available; an applicant should be able to purchase or construct a process or control device that has already been demonstrated in practice." NSR Manual, at B.11; *see also Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981) (*quoting Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519 (1978*)* ("If the technology is not available, the permit applicant is under no duty to consider it in the BACT analysis.")); *In re Spokane Regional Waste-to-Energy Applicant, PSD App. No. 88-12,* 1989 WL 266360 (EPA June 9, 1989)("A technology is obviously not available in any meaningful sense if knowledge about its effect on emissions, in the particular configuration in which it would be employed, is so incomplete as to be unusable"). SCC has not offered any evidence or support that IGCC technology is available

[13] Many other states have also considered and expressly rejected SCC's strained reinterpretation of the BACT requirement. For example, after an environmental group challenged the Wisconsin Department of Natural Resources' approval of a proposed coal fired unit for failure to have considered IGCC in its BACT analysis, an Administrative Judge confirmed that the State was not required to consider IGCC in the BACT analysis. *See* Wisconsin Division of Hearings and Appeals, Case No. IH-04-03 (February 3, 2005). *See also* West Virginia Department of Air Quality, Response to Comments 2, at 35 (West Virginia Department of Air Quality, in considering a PSD permit application for the Longview power plant, concluded that IGCC was not required to be included in the BACT analysis.).

as a control technology option. Accordingly, IGCC cannot be deemed an "available" control technology.

C. Statutory Prohibition on More Stringent State Rules

By asking the Board to disregard the established state rule against using BACT to redefine the source, and more importantly, to create a new state rule that would be dramatically more stringent than the long-established (and recently confirmed in EPA's Reaffirmation Letter) federal policy, SCC is asking the Board to violate the Utah Code. Section 19-2-106 prohibits the Board from making any rule "for the purpose of administering a program under the federal Clean Air Act" that would be "more stringent than the corresponding federal regulations which address the same circumstances."[14] The new rule or policy requested by SCC would require applicants to include IGCC in their BACT analyses for all coal-fueled electricity generating facilities, which would clearly be more stringent than the federal BACT policy which does not require the inclusion of IGCC. As a matter of public policy, the Board should abide by both the letter and the spirit of this statutory prohibition against establishing IGCC as BACT for coal-fueled plants.

D. De Facto Rulemaking

SCC's attempt to fundamentally reinterpret the applicable state regulations is tantamount to a rule-making in that the existing state regulations, which have never been interpreted to require consideration of IGCC as part of a BACT analysis, would be fundamentally changed. Courts and commentators have long "shown near unanimity in extolling the virtues of the rule-making process over the process of making "rules" through case-by-case adjudication." Shapiro, *The Choice of Rulemaking and Adjudication in the Development of Administrative Policy*, 78

[14] The only exception to this prohibition is if the Board "makes a written finding after public comment and hearing and based on evidence in the record, that corresponding federal regulations are not adequate to protect public health and the environment of the state. Utah Code Ann. §19-2-106(2).

Harv. L. Rev. 921 (1965). *See also* Davis & Pierce Treatise § 6.8 ("when an agency ... announces a generally applicable rule in the process of adjudicating a particular dispute, only the parties to the dispute have a role in shaping the "rule," even though it ultimately affects thousands of regulatees and beneficiaries who had no opportunity to participate in the process of its formulation."); Davis & Pierce Treatise § 6.4 ("[m]any legislative rules 'interpret' statutory language, in the sense that they announce the agency's construction of a statute it has responsibility to administer," In essence, allowing such an important public policy issue to be resolved through adjudication would constitute a de facto rule-making proceeding. *See* Davis & Pierce Treatise § 6.4.

SCC's attempt to persuade the Board to reinterpret existing regulations through this Sigurd Plant-specific adjudication could significantly affect the entire regulated community. Significant public policy issues such as these are best resolved by legislation or rulemaking in another forum. Instead of having these broadly applicable public policy issues resolved openly through legislation or rulemaking, SCC is attempting to have them resolved by the Board through a case-specific adjudication. The Board should decline SCC's request that it indulge in this sort of de facto rulemaking.

IV. CONCLUSION

SCC's Claim #3 involves no factual issue, but presents only the legal issue of whether UDAQ was required to include IGCC in its BACT analysis for a proposed coal-fueled facility. Under the applicable regulatory requirements, UDAQ's precedent, and EPA's precedent (recently confirmed in EPA's Reaffirmation Letter), it is clear that UDAQ is not required to include IGCC in its BACT analysis. Accordingly, PacifiCorp respectfully requests that the Board grant the Executive Secretary's Motion on the Pleadings as to SCC's Claim #3.

Dated this 20th day of March, 2006.

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Intermountain Power Service Corp.
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Jessi Walsh

Exhibit A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

DEC 13 2005

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

Mr. Paul Plath
Senior Partner
E3 Consulting, LLC
3333 South Bannock Street, Suite 740
Englewood, Colorado 80110

Subject: Best Available Control Technology Requirements for Proposed Coal-Fired Power Plant Projects

Dear Mr. Plath:

Your firm's letter to me dated February 28, 2005, from D. Edward Settle, asks for the U.S. Environmental Protection Agency's (EPA) position regarding whether an analysis of Best Available Control Technology (BACT) for proposed coal-fired power plants must specifically include evaluation of alternative designs of coal-fueled processes such as integrated gasification combined cycle (IGCC). Generally, the Clean Air Act (CAA) requires an applicant to apply BACT as a condition for issuance of a prevention of significant deterioration (PSD) construction permit in an attainment area. This response provides EPA's view of how the CAA should be interpreted and EPA regulations applied under the particular circumstances presented based on prior EPA policy statements and adjudicatory decisions.

There are two different parts of the PSD permitting process where consideration of alternative designs or production processes may occur. One part is under Section 165(a)(2) where it is required that the permitting authority allow an "opportunity for interested persons ... to appear and submit written or oral presentations on the air quality impact of such source, ***alternatives thereto***, control technology requirements, and other appropriate considerations" (emphasis added). The other part is section 165(a)(4), which requires that a proposed facility subject to PSD apply BACT. In Section 169(3) of the CAA, BACT is defined as "an emission limitation based on the maximum degree of reduction ... which the permitting authority ... determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant."

EPA's view is that, through this language, Congress distinguished "production processes and available methods, systems and techniques" that are potentially applicable to a particular type of facility and should be considered in the analysis of BACT from "alternatives" to the proposed source that would wholly replace the proposed facility with a different type of facility. Although we read this language to draw such a distinction, in practice, it is often not clear when another production process should be considered to fit within the BACT definition and when it should be considered an alternative to the proposed source. This distinction is especially difficult to make for coal gasification because the definition of BACT includes "innovative fuel combustion techniques" in a list of examples of production processes or available methods, systems, or techniques to be considered in the BACT analysis. However, even assuming that coal gasification were in all respects an innovative fuel combustion technique for producing electricity from coal, we do not believe Congress intended for an "innovative fuel combustion technique" to be considered in the BACT review when application of such a technique would redesign the proposed source to the point that it becomes an alternative type of facility, which, as discussed below, we believe would be the case if IGCC were applied to a proposed SCPC unit.

As noted in prior EPA decisions and guidance, EPA does not consider the BACT requirement as a means to redefine the basic design of the source or change the fundamental scope of the project when considering available control alternatives. For example, we do not require applicants proposing to construct a coal-fired steam electric generator to consider building a natural gas-fired combustion turbine as part of a BACT analysis, even though the turbine may be inherently less polluting per unit product (in this case electricity). In re SEI Birchwood Inc, 5 E.A.D. 25 (1994); In re Old Dominion Electric Cooperative, 3 E.A.D. 779 (1992).

Therefore, the question in this instance is whether IGCC results in a redefinition of the basic design of the source if the permittee is proposing to build a supercritical pulverized coal (SCPC) unit. In this situation, EPA's view is that applying the IGCC technology would fundamentally change the scope of the project and redefine the basic design of the proposed source. Portions of an IGCC process are very similar to existing power generation designs that we have previously identified as a redefinition of the basic design of source when an applicant proposed to construct a pulverized coal-fired boiler. The combined cycle generation power block of an IGCC employs the same turbine and heat recovery technology that is used to generate electricity with natural gas at other electrical generation facilities. As noted above, we do not require applicants proposing to construct a coal-fired steam electric generator to consider building a gas-fired combustion turbine as part of a BACT analysis. Furthermore, the core process of gasification at an IGCC facility is more akin to technology employed in the refinery and chemical manufacturing industries than technologies generally in use in power generation (i.e., controlled chemical reaction versus a true combustion process). This technology would necessitate different types of expertise on the part of the company and its employees to produce the desired product (electricity) than the typical SCPC unit. Therefore, where an applicant proposes to construct a SCPC unit, we believe the IGCC process would redefine the basic design of the source being proposed.

Accordingly, consistent with our established BACT policy, we would not require an applicant to consider IGCC in a BACT analysis for a SCPC unit. Thus, for such a facility, we would not include IGCC in the list of potentially applicable control options that is compiled in the first step of a top-down BACT analysis. Instead, we believe that an IGCC facility is an alternative to an SCPC facility and therefore it is most appropriately considered under Section 165(a)(2) of the CAA rather than section 165(a)(4).

Your letter did not specifically request guidance on whether IGCC should be considered in a LAER analysis for a SCPC, but I am taking this opportunity to address the issue. As with BACT, an applicant must generally comply with LAER as a condition for issuance of a nonattainment new source review (NSR) permit in a nonattainment area. Section 173(a)(5) of the CAA requires an applicant to conduct, "an analysis of ***alternative sites, sizes, production processes*** and environmental control techniques for such proposed source." (emphasis added). Because we believe IGCC results in a redefinition of the source in this situation, it should not be considered in a LAER analysis for a SCPC unit. Nonetheless, we believe that the technology should be considered under Section 173(a)(5) when an SCPC unit is proposed in nonattainment areas.

I trust that this response addresses the issues raised in your letter.

Sincerely,

Stephen D. Page
Director
Office of Air Quality, Planning
and Standards

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Attorneys for the Executive Secretary, Utah Air Quality Board

BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Sevier Power Company Power Plant Sevier County, Utah DAQE-AN2529001-04	EXECUTIVE SECRETARY'S MOTION TO DISMISS SEVIER COUNTY CITIZENS FOR CLEAN AIR AND WATER'S FIRST REQUEST FOR AGENCY ACTION AND PETITION TO INTERVENE

Pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, the Executive Secretary moves the Air Quality Board for an order dismissing with prejudice Sevier County Citizens' October 12, 2004 Request for Agency Action. The grounds for this motion are that each claim in the Request for Agency Action fails to state a claim upon which relief can be granted.

This motion is supported by a memorandum in support filed with this motion and all other pleadings on file with the Board in this action.

Dated this 27th day of February, 2006.

MARK L. SHURTLEFF
Utah Attorney General

PAUL M. McCONKIE
CHRISTIAN C. STEPHENS
Assistant Attorneys General

CERTIFICATE OF SERVICE

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Attorneys for the Executive Secretary, Utah Division of Air Quality

BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Sevier Power Company Power Plant Sevier County, Utah DAQE-AN2529001-04	EXECUTIVE SECRETARY'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS SEVIER COUNTY CITIZENS FOR CLEAN AIR AND WATER'S FIRST REQUEST FOR AGENCY ACTION AND PETITION TO INTERVENE

COMES NOW the Executive Secretary, through undersigned counsel, and submits the following Memorandum in Support of its Motion to Dismiss for Failure to State a Claim on Which Relief Can Be Granted.

I. INTRODUCTION

On October 12, 2004, the Executive Secretary issued an Approval Order (AO) to Sevier Power Company (SPC) to construct and operate a coal-fired power plant in Sevier County, Utah. On November 1, 2005, Sevier County Citizens for Clean Air and Water (Sevier County Citizens or SCC) filed a Request for Agency Action (RFA) appealing the SPC AO. The Executive Secretary responded by requesting that the Board dismiss without prejudice Sevier County Citizens' RFA, due to numerous deficiencies in the RFA relating to standing and intervention, as well as deficiencies in its claims. As a result of the Executive Secretary's response, and before

the Board took any action on the RFA, SCC filed another document on March 16, 2005, attempting to set forth more specific reasons for the group's challenge. The Executive Secretary did not challenge this second filing by SCC, and represented at the Board meeting that he no longer opposed the intervention of SCC.[1] Therefore, the Board took no action on the Executive Secretary's motion, and consequently never determined the status of SCC's first RFA.

The case has now progressed through discovery in anticipation of a formal adjudication in May 2006. To ensure the proper scope of the hearing, the Executive Secretary now renews his motion to dismiss with prejudice SCC's first RFA, as it has been superseded by SCC's second RFA. Granting the motion to dismiss will properly limit the issues to those raised with more specificity, as the first RFA contains numerous legal deficiencies and does not adequately allege facts that would allow the Executive Secretary to defend his work or permit the Board to adjudicate the dispute. Accordingly, the Executive Secretary moves to dismiss with prejudice Sevier County Citizens' first RFA and petition to intervene for failure to state a claim upon which relief can be granted.

II. MOTIONS TO DISMISS IN ADMINISTRATIVE PROCEEDINGS

Pursuant to the Utah Administrative Procedures Act, the Presiding Officer may "grant[] a timely motion to dismiss . . . if the requirements of Rule 12(b) . . . of the Utah Rules of Civil Procedure are met by the moving party . . . ." Utah Code Ann. § 63-46b-1(4)(b). Specifically, a motion to dismiss for failure to state a claim upon which relief can be granted is appropriate when it "'appears that the plaintiff . . . would not be entitled to relief under the facts alleged or under any state of facts [it] could prove to support [its] claim.'" Bennett v. Jones, Waldo, Holbrook & McDonough, 70 P.3d 17, 30 (Utah 2003), *quoting* Clark v. Deloitte & Touche LLP,

[1] Transcript of April 13, 2005 Air Quality Board Meeting at 41; Order Re: Petitions to Intervene, In the Matter of Sevier Power Company Power Plant.

34 P.3d 209, 212 (Utah 2001); Utah R. Civ. Pro. 12(b)(6). A motion to dismiss focuses only on "the sufficiency of the pleadings, not the underlying merits of [the] case." Alvarez v. Galetka, 933 P.2d 987, 989 (Utah 1997). The Presiding Officer should dismiss the pleading "'if it is apparent that as a matter of law, the plaintiff[s] could not recover under the facts alleged.'" Bennett, 70 P.3d at 30.

If the Board grants this motion, the hearing will be limited to claims raised in SCC's second RFA. The first RFA does not allege any facts that support SCC's claims, nor could SCC allege any facts that would support those claims, because the relief it sought by the first RFA is not available in this administrative forum. Moreover, SCC's second RFA presents claims that SCC has represented to the parties and to the Board to be its specific allegations. Therefore, the second RFA has effectively superseded the first, and therefore the Board should clarify this by formally dismissing the first RFA.

To the extent that the first RFA is still considered valid, the Executive Secretary renews its contention that as to those claims, SCC has not achieved standing to pursue them. The Executive Secretary has already raised the arguments on standing, and does not restate them here. However, the Executive Secretary notes that standing is a jurisdictional requirement and is subject to challenge at any time by the parties or the Board. *See* Washington County Water Conservancy Dist.v. Morgan, 82 P.3d 1125, 1128 n.2 (Utah 2003) (standing is a jurisdictional requirement); Harris v. Springville City, 712 P.2d 188, 190 (Utah 1986) ("[l]ack of standing is jurisdictional"); Wade v. Burke, 800 P.2d 1106, 1108 (Utah Ct. App. 1990) ("[e]ither party, or the court on its own motion, may properly raise the issue of standing for the first time on appeal"); Sierra Club, 857 at 984 (standing may be raised *sua sponte* at any point in the

proceedings). Because standing may be raised at any time, the Executive Secretary may raise the defense at this point in the proceedings.

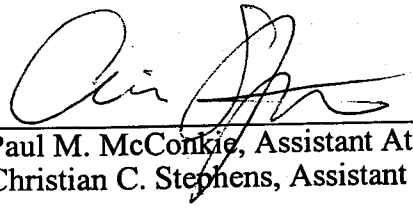
As to its first RFA, Sevier County Citizens has not properly alleged standing and has failed to satisfy the intervention requirements. Therefore, because Sevier County Citizens "has failed to plead a cognizable and actionable claim," the appropriate action is to dismiss Sevier County Citizens' first RFAA with prejudice for failure to state a claim upon which relief can be granted. Pett v. Fleet Mort. Corp., 91 P.3d 854, 857 (Utah Ct. App. 2004).

CONCLUSION

Sevier County Citizens' first Request for Agency Action fails to allege facts demonstrating that that Sevier County Citizens' members have suffered a particularized injury caused by the Executive Secretary's action, and that the relief the group requests will remedy that injury. Due to the first request's deficiencies, the Executive Secretary asserts that Sevier County Citizens has not obtained standing on those claims raised in the first request. Since SCC has filed a second request, the Executive Secretary respectfully requests that the Air Quality Board dismiss with prejudice Sevier County Citizens' November 1, 2004 Request for Agency Action for failure to state a claim on which relief can be granted.

Dated this 27th day of February, 2006.

MARK L. SHURTLEFF
Utah Attorney General



Paul M. McConkie, Assistant Attorney General
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BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of:	+	Response to Executive Secretary's Motion to Dismiss Sevier County Citizens For Clean Air And Water's First Request For Agency Action and Petition to Intervene
Sevier Power Company Power Plant Sevier County, Utah DAQE - AN2529001-04	+	

Comes now, the Sevier County Citizens For Clean Air And Water, Inc., hereby responds to the Executive Secretary's motion to dismiss Sevier Citizens For Clean Air And Water's first request for Agency Action.

The Executive Secretary misrepresents the facts in the case as only one Request for Agency Action was made. The Request had an answer to questions raised by the Executive Secretary, dated the 16th, day of

March, 2005. To quote from that document, "Sevier County Citizens For Clean Air & Water, Response to Executive Secretary's comments on Sevier Citizens Legal Right to Intervene and Have Standing."

"Sevier Citizens For Clean Air And Water will respond to the Executive Secretary's request for clarification of Sevier County Citizens For Clean Air And Water petition to Intervene and be granted Standing.
\
This is to answer questions raised by counsel for the Executive Secretary, dated, January 28, 2005. This response is to be considered in addition to our Request For Agency Action, dated November 1, 2004."

Pursuant to Utah Administrative Procedures R 307-103-5 (1) (2) and R 307-103-6 (2) (6), the Sevier Citizens moves to dismiss the Executive Secretary's motion on the grounds stated in the Utah Administrative Procedures Code.

This motion is supported by the memorandum in support of this motion filed in conjunction with this motion and supported by the evidence presented during the proceedings of this Appeal.

James Kennon

James Kennon, President

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Before the Utah Air Quality Board

In the Matter of:	+	Sevier Citizens For Clean
	+	Air And Water's
	+	Memorandum supporting
Sevier Power Company Power Plant	+	the dismissal of the
Sevier County, Utah	+	Executive Secretary's
DAQE - AN2529001-04	+	request to dismiss Sevier
	+	Citizens Request For
	+	Agency Action and
	+	Petition to Intervene

The Sevier County Citizens For Clean Air And Water, Inc., submits the following Memorandum in Support of our Motion to dismiss the Executive Secretary's request to dismiss our Request For Agency Action and Petition to Intervene.

1.Introduction

The Executive Secretary at this late date in the proceedings is attempting to rehash arguments that date back to November 1, 2004. The

attempting to rehash arguments that date back to November 1, 2004. The Executive Secretary had 30 days to respond to the Agency Action and choose not to. The Utah Administrative Procedures Code requires a prompt review of the request for agency action.

The Sevier Citizens has been involved in the process from the very beginning. Now is not the time for the Executive Secretary to go back over issues by using legal hat tricks to bar citizen involvement in the process.

2. Executive Secretary's Motion to Dismiss pursuant to Rule 12(b)(6)

Rule 12. Defenses and objections

Sevier Citizens believes the Executive Secretary is referring to Rule 12 (2)(b)(6) that states, "failure to state claim upon which relief can be granted,"

Sevier Citizens has proceeded in good faith during the process of the Appeal. The Executive Secretary is now engaging in a plan of action that will do nothing to advance due process.

The Air Quality Board agreed to a schedule dated December 23,

2005. That agreement has been followed up to this point in time. That schedule called for a March 13, 2006 deadline for Response/ Opposition memos, and etc. That set a 14 day response period of time.

Rule 12 allows for a 20 day response time after the service date. The added period of time would have given Sevier Citizens an opportunity to respond in a more comprehensive manner.

Pursuant to Rule 12 (2)(b)(6), the Executive Secretary could have filed a motion for more definite statement. The motion shall point out the defects complained of and details desired.

CONCLUSION

Sevier Citizens request that in the "Interest of Justice" the Air Quality Board dismiss the Executive Secretary's Motion to Dismiss.

James Kennon

James Kennon, President

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Attorneys for the Executive Secretary of the Utah Air Quality Board

BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Sevier Power Company Power Plant Sevier County, Utah DAQE-AN2529001-04	EXECUTIVE SECRETARY'S REPLY TO SEVIER COUNTY CITIZENS' RESPONSE TO MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

COMES NOW the Executive Secretary, through undersigned counsel, and submits the following Reply to Sevier County Citizens' Response to Motion to Dismiss for failure to State a Claim on Which Relief can be Granted.

I. INTRODUCTION

On February 27th, 2006, the Executive Secretary filed a Motion to Dismiss relating to the November 1, 2004 Request for Agency Action (RFA) filed by Sevier County Citizens for Clean Air and Water (Sevier Citizens or SCC). SCC has filed its RFA to challenge an Approval Order (AO) issued by the Executive Secretary to Sevier Power Company (SPC). For the sake of brevity, the Executive Secretary notes that his initial memorandum outlines the procedural history of this case, and therefore he does not repeat that history here.

On March 13, 2006, SCC answered the Motion to Dismiss, and the Executive Secretary hereby replies to SCC's response. SCC presents no persuasive reason why its first four

allegations should not be dismissed with prejudice, as those allegations have been replaced and superseded by the 14 claims raised in a SCC filing on March 16, 2005. The Executive Secretary maintains that the Board should issue an order to clarify the record to that effect.

ARGUMENT

Plainly, SCC misunderstands the purpose of the Executive Secretary's Motion to Dismiss. The purpose of the Motion is to ask the Board formally to clarify which claims are truly at issue. At the initiation of this case, the Executive Secretary filed a Motion to Dismiss on January 28, 2005. Due to a second filing by SCC, the Board never took action on that Motion to Dismiss. The Executive Secretary's recent filing renews its original Motion to Dismiss and requests that the Board make a final decision on the four allegations raised in SCC's November 1, 2004 Request for Agency Action. The Motion to Dismiss addresses only those four generalized allegations.

Then as well as now, the Executive Secretary has maintained that the first four allegations raised by SCC are generalized grievances that fail to state a claim on which relief can be granted. The law does not recognize such vague claims, as they are not specific enough to permit a response or a remedy. Indeed, if SCC believed that its first four allegations were sufficient, why did it file a subsequent document containing 14 new claims?

SCC has not organized its Reply in a point-by-point fashion. Therefore, the Executive Secretary responds below to SCC's document one issue at a time.

1. The Executive Secretary did not fail to respond to SCC's Request for Agency Action.

In its response, SCC states that "the Executive Secretary had 30 days to respond to the Agency Action and choose [*sic*] not to." A simple examination of the record in this case shows that the Board instructed the Executive Secretary to respond to SCC's RFA by January 28,

2006.[1] The Executive Secretary did indeed respond by that date by filing a Motion to Dismiss, as permitted by law. Therefore, SCC's contention to the contrary is meritless.

2. The Executive Secretary's filings have followed the schedule approved by the Air Quality Board.

SCC correctly notes that on December 23, 2005, the Board approved a schedule governing discovery and other pre-hearing matters. This schedule resulted from discussions of all parties, including SCC. To the extent that SCC believes that the schedule is inadequate, SCC should have raised that concern before agreeing to the schedule.

3. The Executive Secretary has not misrepresented the procedural facts of this case.

SCC accuses the Executive Secretary of misrepresenting the procedural history of this case. Specifically, SCC claims that only one RFA has been filed, and that any subsequent documents are additions thereto. While a minor point, some elaboration is warranted for the sake of clarification.

The Executive Secretary acknowledges that subsequent filings were not entitled "Requests for Agency Action." However, considering that SCC basically re-filed its initial RFA with 14 entirely new claims, how SCC chooses to entitle its filing is immaterial. Semantics aside, in its March 16, 2005 filing SCC presented entirely new arguments for the Board's consideration. Thus, SCC filed a new document purporting to raise new claims.

Moreover, SCC claims to have submitted this second document to "answer . . . questions raised by the Executive Secretary." The Executive Secretary did not "ask questions," make "comments on Sevier Citizens Legal Right to Intervene and Have Standing," or "request clarification" from SCC, but rather filed a Motion to Dismiss. Regardless of how it chooses to entitle its second filing, SCC cannot escape the fact that it raised entirely new claims on March

[1]Notification of Further Proceedings, In the Matter of Sevier Power Company Power Plant at 2 (January 6, 2005).

16, 2005. Those claims and those claims only should be the subject of any hearing. The Executive Secretary has never retreated from his initial contention that the four generalized allegations in SCC's November 1, 2004 RFA fail to state a claim on which relief can be granted, and that SCC cannot achieve standing based on those four allegations alone.

CONCLUSION

Sevier County Citizens has raised two sets of claims in this case. The Executive Secretary has long maintained that the first set of allegations should be dismissed pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, as they fail to state a claim on which relief can be granted. Accordingly, the Executive Secretary respectfully requests that the Air Quality Board grant its Motion to Dismiss Sevier County Citizens' first set of allegations as they appear in SCC's November 1, 2004 Request for Agency Action.

Dated this 20th day of March, 2006.

MARK L. SHURTLEFF
Utah Attorney General

Paul M. McConkie, Assistant Attorney General
Christian C. Stephens, Assistant Attorney General

CERTIFICATE OF SERVICE

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BEFORE THE UTAH AIR QUALITY BOARD

In the matter of: Sevier Power Company Power Plant; Sevier County, Utah Case No. DAQE-AN25290010-04	SEVIER POWER COMPANY'S MEMORANDUM IN SUPPORT OF THE EXECUTIVE SECRETARY'S MOTIONS FOR DISMISSAL

The Executive Secretary has filed two motions, with supporting memorandum, dated February, 27, 2006. The first motion is a Utah Rules of Civil Procedure, Rule 12(b)(6). motion for an order dismissing with prejudice, Sevier County Citizens' October 12, 2004 Request for Agency Action ("RFA") for failure to state a claim upon which relief can be granted. The second motion is a Utah Rules of Civil Procedure, Rule 12(c) Motion for Judgment on the Pleadings on allegations raised in the Sevier County Citizens for Clean Air and Water ("Sevier County Citizens: or "SCC") second RFA, dated March 16, 2005.

The Sevier Power Company ("SPC") supports the two motions of the Executive Secretary. When the Executive Secretary objected to the SCC first RFA because of standing, intervention and claim deficiencies, the SCC filed a second RFA, dated March 16, 2005. This is the RFA that is currently before the Board. It is the RFA that both the Executive Secretary and the Sevier Power Company have responded to in their answers. It is the RFA that discovery was based on. The second RFA has superseded the first RFA in actuality. The Sevier Power Company supports the dismissal of the SCC first RFA dated, October 12, 2004.

The second motion filed by the Executive Secretary seeks judgment on a number of the allegations raised in the SCC second RFA, dated March 16, 2005. The main issue before the Board in the second RFA is whether the Executive Secretary conducted the proper regulatory review in issuing the Sevier Power Company's Approval Order, dated October 12, 2004. In the Executive Secretary's **Memorandum In Support Of Motion For Judgment On The Pleadings,** dated February 27, 2006, the Executive Secretary has provided the Board with an excellent review of the requirements for the issuance of an Approval Order and a short history of the compliance with those requirements which entitled Sevier Power Company to receive the October 12, 2004 Approval Order. The Sevier Power Company agrees with the Executive Secretary's Introduction, Regulatory Background, Standard of Review, and Statement of Undisputed Facts as stated in the February 27, 2006 Memorandum.

The Executive Secretary's argument requests that the Board grant a summary judgment against the SCC and for the Executive Secretary and the Sevier Power Company on the following claims contained in the Sevier County Citizen's second RFA, dated March 16, 2005

SCC Claim 1: UDAQ failed to evaluate the combined emissions of the three proposed coal-fired power plants currently under application in the state of Utah and the effects it would have upon the nearby National Parks.

SPC included a review of those sources in its application as required by Utah Admin. Code R307-405-6(2). It did not include a review of sources that are not "approved sources" such as Hunter 4 and even at that time, IPA #3. The actions of the Executive Secretary have complied with the law and a judgment to that effect on this claim is appropriate.

SCC Claim 2: Should the petitioner wait until actual injury has occurred, which cannot precede the completion of the SPC project, there can be little redress beyond enforcing the emission limitation of this Approval Order. Therefore the protest must be addressed prior to issuance of the Approval Order.

As noted by the Executive Secretary, this appears to be a standing and intervention argument. The Board has already granted standing so this claim is moot and should be dismissed as a matter of law.

SCC Claim 3: UDAQ failed to adequately consider the use of IGCC both as a viable method of achieving BACT and as a cost effective way to minimize emissions.

Federal and State law, as well as UDAQ Regulation require a facility to employ the "best available control technology" ("BACT"). A complete BACT review was submitted by Sevier Power Company that did not select the IGCC technology as the facility BACT. The decision by the SPC not to select the IGCC and the Executive Secretary to permit a different BACT than IGCC is consistent with EPA's position cited by the Executive Secretary that IGCC is not a control technology but a separate process which would redefine the SPC proposed power plant. There is no genuine issue of material fact and the Executive Secretary is entitled to a judgment as a matter of law on this claim.

SCC Claim 6: Maximum predicted concentrations of PM10 in areas where the applicant has significant impact would occur along the eastern edge of the proposed site's boundary, and is the result of coal handling processes at the plant.

The modeling submitted as part of the application shows that any PM10 impact is below the federal National Ambient Air Quality Standards (NAAQS), whether at the center of the plant or along the eastern boundary of the plant site. The highest predicted impact was less than the PSD Class II increment standard (as required by rule) which is only 20% of the federal health-based NAAQS as discussed in the Executive Secretary's Memorandum. SCC makes no claim as to any disputed fact or that the Executive Secretary has violated any permitting requirement and therefore the SCC claim #6 should be dismissed as a matter of law.

SCC Claim 7: Fish Lake National Forest and Dixie National Forest are each in the process of implementing a "scheduled burn" program to improve the quality of the national forests. During the next ten years, each jurisdiction will potentially expel many tons of ash and

pollutants into the local atmosphere which, by themselves, may potentially make Sevier Valley a non-attainment area. This potential is not noted in the NOI and is a major omission in modeling the air shed of Sevier Valley.

The Utah Admin. Code, R307-101-2 requires a major source review to include all allowable emissions of approved sources or modifications and the cumulative effect on air quality of all sources and growth in the affected area. Temporary sources, such as controlled burns are not included in this review. Prescribed burns are administered by a different regulation, R307-204, for the smoke management program and are evaluated as part of a wild land fire implementation plan. This is a part of the State air quality inventory and is factored into the background requirements as part of the modeling for PSD permits. Utah Admin. Code R307-204-4(4). As noted by the Executive Secretary, the pertinent Federal Land Managers ("FLMs") were given time to review the application study and any impact on air quality-related values. None of the FLMs raised any such issues or concerns about prescribed burns and the plant operation. Any future prescribed burn by any of the FLMs will have to comply with the state's smoke management plan. The Executive Secretary correctly did not consider the future prescribed burns in his review because was not required nor appropriate. There is no genuine issue of material fact related to this claim and a judgment against SCC Claim 7 as a matter of law should be issued.

SCC Claim 10: UDAQ illegally did not consider the impact on waterfowl and wildlife, Chap. 19-2-101(2) of the Utah Air Conservation Act. This chapter requires that UDAQ "prevent injury to plant and animal life and property." The U.S. Wildlife Service and Utah Div. of Wildlife were never contacted and no studies were undertaken. Migrating waterfowl and others, such as ducks, geese, cranes, and eagles, nest and feed in the area. The eagle's main food source in the winter is jackrabbit that frequents the area of the power plant. Not only did UDAQ ignore the studies on wildlife and animals, they ignored comments stated during the public comment period on this subject.

This claim displays a lack of understanding on the part of the SCC about the role of NAAQS requirements, including secondary NAAQS requirements which are designed to protect

wildlife and water fowl. The impact analysis submitted by the Sevier Power Company demonstrated that impacts of the proposed plant operation were well within the secondary limits for PM10, NO2 and SO2 which are designed to protect against decreased visibility and to prevent damage to animals, crops, vegetation and buildings. As noted, the Executive Secretary sent the entire NOI to the National Park Service, the Forest Service and the Bureau of Land Management for a 60 day review period. No comments about alleged injury from the proposed plant's operation were submitted. The SCC relies on a general statement in UCA Section 19-2-101(2) to suggest that a wildlife study is required. The Sevier Power Company agrees with the Executive Secretary that general statements cannot be used as an independent operative provision of the statute. There is no issue of fact and the Executive Secretary is entitled to a judgment as a matter of law on this claim.

SCC Claim 11: UDAQ did not thoroughly analyze the impact of health issues on citizens (sic) living in the shadow of the (SPC) power plant.

The NAAQS are health-based standards set at levels that protect the health of the population, including sensitive populations. Health protection is the sole criteria for setting the primary NAAQS. Compliance with the NAAQS meets the health protection issue; additional health study is not required. The application submitted by the Sevier Power Company indicates that the proposed plant will produce amounts that are substantially less than the NAAQS. The Executive Secretary is entitled to a judgment on this claim as a matter of law.

SCC Claim 12: UDAQ failed to consider the financial impact of the property values, job loss, and additional medical expenses that the people of Sevier County will suffer from the AO of the Sevier Power Company permit.

Utah Admin. Code R307-405-6(2)(i)(D) requires an analysis of the air quality related impact of the source. This rule does not require an economical impact analysis of the plant. If it did, then it would have to review the positive economic impact of the plant on the surrounding

community. The citizens from Millard County were certainly ready to testify to the Board about the positive economic impact of the IPA plant on their community. Economic analysis is not required by statute or regulation and the Executive Secretary is entitled to a judgment as a matter of law on this claim.

SCC Claim 13: UDAQ did not consider the detrimental effects of the Sevier Power Company plant on the surrounding 'natural attractions of this state. [Utah Air Conservation Act Chap. 19-2-101(2).]

Once again, this claim of the SCC seems to overlook the requirement that potential impacts to "surrounding natural attractions" were included in the Class I area impacts analysis. This analysis was an integral part of the application submitted by the Sevier Power Company and the Executive Secretary concluded that the application did not identify any potential significant impact to Class I areas. It should be noted again that the FLMs were given copies of the NOI and they did not respond with concerns about the impact of the plant on their respective federal lands. The Executive Secretary is entitled to a judgment on this claim as a matter of law.

CONCLUSION

The Sevier Power Company believes that the Executive Secretary is entitled to a judgment as a matter of law on the claims in the SCC second RFA that are identified herein. The Executive Secretary is also entitled to a Motion Dismissing with Prejudice the first RFP filed by the SCC. Therefore the Sevier Power Company respectfully requests that the Air Quality Board grant the two motions requested by the Executive Secretary, dated February 27, 2006.

DATED this 15th day of March, 2006

FINLINSON & FINLINSON, PLLC

Fred W. Finlinson

CETRIFICATE OF DELIVERY

I hereby certify that a copy of the foregoing Sevier Power Company's Memorandum In Support Of The Executive Secretary's Motions For Dismissal was served on the persons below on this 15th day of March, 2006 by U.S. Mail, postage prepaid:

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February 15, 2006

Subject: Witness list, Sevier Power Company Appeal

Dear Sirs: Enclosed is the witness list from the Sevier Citizens For Clean Air And Water, Inc.

The following list of witnesses are both Expert and Factual. The below names are the Expert witnesses;

A. Kendall Bingham
B. Michael Orton
C. Thann Hanchett
D. Gerald Robinson
E. Dee Rees

Two additional witnesses came forward and they are:

A. Gary Mc Conaghy
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B. Russel Jenson
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I hereby certify that on this 15th day of February, 2006, I caused a copy of the forgoing to be mailed by United States Mail, postage prepaid to the following:

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BEFORE THE UTAH AIR QUALITY BOARD

SEVIER COUNTY CITIZENS FOR CLEAN AIR AND WATER Petitioner, And SEVIER POWER COMPANY; and the EXECUTIVE SECRETARY OF THE UTAH AIR QUALITY BOARD, Respondents	In the matter of Sevier Power Company Power Plant; Case No. DAQE-AN2529001004 SEVIER POWER COMPANY'S WITNESS LIST

The Sevier Power Company anticipates that the following witness will or may be called to testify at the evidentiary hearing:

George Wilkerson
Meteorological Solutions, Inc.
2257 South 1100 East, Suite 203
Salt Lake City, Utah 84106
(801) 474-3826

The Sevier Power Company designates all persons identified on the factual witness list of any other party. The Sevier Power Company also reserves the right to call rebuttal witnesses as necessary.

DATED this 23rd day of February, 2006

FINLINSON & FINLINSON, PLLC

Fred W. Finlinson

Fred W. Finlinson

CETRIFICATE OF DELIVERY

I hereby certify that a copy of the foregoing Sevier Power Company's Witness List was served on the persons below on this 23rd day of February, 2006 by electronic mail, and U.S. Mail, postage prepaid:

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BEFORE THE UTAH AIR QUALITY BOARD

SEVIER COUNTY CITIZENS FOR CLEAN AIR AND WATER Petitioner, and SEVIER POWER COMPANY; and the EXECUTIVE SECRETARY OF THE UTAH AIR QUALITY BOARD, Respondents	In the matter of Sevier Power Company Power Plant; Case No. DAQE-AN2529001-04 EXECUTIVE SECRETARY'S WITNESS LIST

The Executive Secretary anticipates that the following witnesses will or may be called to testify at the evidentiary hearing:

1. Rick Sprott, Executive Secretary, Utah Air Quality Board. Issued Approval Order; Employee fact/expert
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   P.O. Box 144820
   Salt Lake City, UT 84114-4820
   (801) 536-4022

2. John Jenkes, DEQ/DAQ Environmental engineer. Wrote Approval Order; Employee fact/expert
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3. Rusty Ruby, DEQ/DAQ Section Manager, New Source Review; Employee fact/expert
   150 North 1950 West

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4. Regg Olsen, DEQ/DAQ Permitting Branch Manager; Employee fact/expert
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5. Tom Orth, DEQ/DAQ; Air Quality Monitoring Consultant; Reviewed near-field modeling; Employee fact/expert
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6. Dave Prey, DEQ/DAQ; Air Quality Monitoring Consultant; Reviewed far-field modeling Employee fact/expert
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7. Dr. Steve Packham, DEQ/DAQ Toxicologist; Employee fact/expert
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8. Collin Campbell; RTP Environmental Associates. Consultant who reviewed permit application at DAQ's request. Fact/expert
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The Executive Secretary designates all persons identified on the factual witness list of any other party. The Executive Secretary also reserves the right to call rebuttal witnesses as

necessary.

DATED this 15th day of February, 2006.

MARK L. SHURTLEFF
ATTORNEY GENERAL

Paul M McConkie

Paul M. McConkie
Christian Stephens
Assistant Attorneys General

CERTIFICATE OF DELIVERY

I hereby certify that a copy of the foregoing Executive Secretary's Witness List was served on the persons below on this 15th day of February, 2006, by electronic mail, and U.S. Mail, postage prepaid:

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